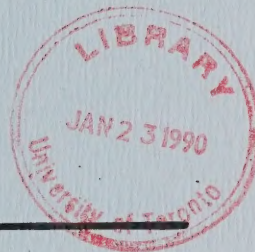




# ENVIRONMENTAL ASSESSMENT BOARD



VOLUME: 173

DATE: Tuesday, January 16th, 1990

BEFORE: M.I. JEFFERY, Q.C., Chairman  
E. MARTEL, Member  
A. KOVEN, Member

FOR HEARING UPDATES CALL (TOLL-FREE): 1-800-387-8810

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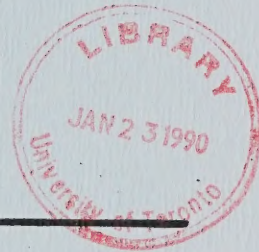
2300 Yonge St., Suite 709, Toronto, Canada M4P 1E4







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HEARING ON THE PROPOSAL BY THE MINISTRY OF NATURAL  
RESOURCES FOR A CLASS ENVIRONMENTAL ASSESSMENT FOR  
TIMBER MANAGEMENT ON CROWN LANDS IN ONTARIO

IN THE MATTER of the Environmental  
Assessment Act, R.S.O. 1980, c.140;

- and -

IN THE MATTER of the Class Environmental  
Assessment for Timber Management on Crown  
Lands in Ontario;

- and -

IN THE MATTER OF a Notice by the  
Honourable Jim Bradley, Minister of the  
Environment, requiring the Environmental  
Assessment Board to hold a hearing with  
respect to a Class Environmental  
Assessment (No. NR-AA-30) of an  
undertaking by the Ministry of Natural  
Resources for the activity of timber  
management on Crown Lands in Ontario.

-----  
Hearing held at the Ramada Prince Arthur  
Hotel, 17 North Cumberland St., Thunder  
Bay, Ontario, on Tuesday, January 16th,  
1990, commencing at 8:30 a.m.

-----  
VOLUME 173

BEFORE:

MR. MICHAEL I. JEFFERY, Q.C.	Chairman
MR. ELIE MARTEL	Member
MRS. ANNE KOVEN	Member





A P P E A R A N C E S

MR. V. FREIDIN, Q.C.)	
MS. C. BLASTORAH )	MINISTRY OF NATURAL
MS. K. MURPHY )	RESOURCES
MS. Y. HERSCHER )	
MR. B. CAMPBELL )	
MS. J. SEABORN )	MINISTRY OF ENVIRONMENT
MS. B. HARVIE )	
MR. R. TUER, Q.C.)	ONTARIO FOREST INDUSTRY
MR. R. COSMAN )	ASSOCIATION and ONTARIO
MS. E. CRONK )	LUMBER MANUFACTURERS'
MR. P.R. CASSIDY )	ASSOCIATION
MR. H. TURKSTRA	ENVIRONMENTAL ASSESSMENT
	BOARD
MR. E. HANNA )	ONTARIO FEDERATION OF
DR. T. QUINNEY )	ANGLERS & HUNTERS
MR. D. HUNTER )	NISHNAWBE-ASKI NATION
MS. N. KLEER )	and WINDIGO TRIBAL COUNCIL
MR. J.F. CASTRILLI)	
MS. M. SWENARCHUK )	FORESTS FOR TOMORROW
MR. R. LINDGREN )	
MR. P. SANFORD )	KIMBERLY-CLARK OF CANADA
MS. L. NICHOLLS)	LIMITED and SPRUCE FALLS
MR. D. WOOD )	POWER & PAPER COMPANY
MR. D. MacDONALD	ONTARIO FEDERATION OF
	LABOUR
MR. R. COTTON	BOISE CASCADE OF CANADA
	LTD.
MR. Y. GERVAIS)	ONTARIO TRAPPERS
MR. R. BARNES )	ASSOCIATION
MR. R. EDWARDS )	NORTHERN ONTARIO TOURIST
MR. B. McKERCHER)	OUTFITTERS ASSOCIATION





APPEARANCES: (Cont'd)

MR. L. GREENSPOON)	NORTHWATCH
MS. B. LLOYD )	
MR. J.W. ERICKSON, Q.C.)	RED LAKE-EAR FALLS JOINT
MR. B. BABCOCK )	MUNICIPAL COMMITTEE
MR. D. SCOTT )	NORTHWESTERN ONTARIO
MR. J.S. TAYLOR)	ASSOCIATED CHAMBERS OF COMMERCE
MR. J.W. HARBELL)	GREAT LAKES FOREST
MR. S.M. MAKUCH )	
MR. J. EBBS	ONTARIO PROFESSIONAL FORESTERS ASSOCIATION
MR. D. KING	VENTURE TOURISM ASSOCIATION OF ONTARIO
MR. D. COLBORNE )	GRAND COUNCIL TREATY #3
MS. S.V. BAIR-MUIRHEAD )	
MR. R. REILLY	ONTARIO METIS & ABORIGINAL ASSOCIATION
MR. H. GRAHAM	CANADIAN INSTITUTE OF FORESTRY (CENTRAL ONTARIO SECTION)
MR. G.J. KINLIN	DEPARTMENT OF JUSTICE
MR. S.J. STEPINAC	MINISTRY OF NORTHERN DEVELOPMENT & MINES
MR. M. COATES	ONTARIO FORESTRY ASSOCIATION
MR. P. ODORIZZI	BEARDMORE-LAKE NIPIGON WATCHDOG SOCIETY





APPEARANCES: (Cont'd)

MR. R.L. AXFORD	CANADIAN ASSOCIATION OF SINGLE INDUSTRY TOWNS
MR. M.O. EDWARDS	FORT FRANCES CHAMBER OF COMMERCE
MR. P.D. McCUTCHEON	GEORGE NIXON
MR. C. BRUNETTA	NORTHWESTERN ONTARIO TOURISM ASSOCIATION





I N D E X   O F   P R O C E E D I N G S

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I N D E X   O F   E X H I B I T S

<u>Exhibit No.</u>	<u>Description</u>	<u>Page No.</u>
992	OFAH Interrogatory No. 1	30658
993	Exemption order MNR 11-9.	30779
994	Ministry of Environment 1981 General Guidelines for the Preparation of Environmental Assessments.	30782
995	EA Update dated January, 1977.	30832
996	October, 1976 EA Update.	30834
997	Ontario Regulation 205-87.	30834





1 ---Upon commencing at 8:45 a.m.

2 THE CHAIRMAN: Thank you. Be seated,  
3 please.

4 Mr. Freidin, Ms. Blastorah, I don't know  
5 who is going to address the issues we dealt with last  
6 week, but I think we are waiting to hear from your side  
7 first of all.

8 MS. BLASTORAH: Mr. Chairman, Mr. Freidin  
9 is going to address that matter. I just had one  
10 housekeeping item beforehand.

11 I spoke to Mr. Edwards after the hearing  
12 on Thursday and he was under the impression that the  
13 interrogatory he referred to during his  
14 cross-examination had already been marked as part of  
15 our package, which was not the case, so I agreed to  
16 file the OFAH Interrogatory No. 1 on his behalf.

17 THE CHAIRMAN: Okay. Exhibit 992.

18 MS. BLASTORAH: And I have copies for the  
19 Board and the exhibit copy, but I didn't make copies  
20 for the other parties. (handed)

21 THE CHAIRMAN: Thank you.

22 ---EXHIBIT NO. 992: OFAH Interrogatory No. 1.

23 MR. FREIDIN: Mr. Chairman, I am going to  
24 address the issues which were raised the other day in a  
25 number of different parts and the first part of my

1       submissions basically are going to do two things: I  
2       want to go back to basics and explain the difference  
3       between a specific environmental assessment and a class  
4       environmental assessment, because I think it is  
5       necessary to have a good understanding of what those  
6       two concepts mean before I deal with the second issue  
7       in the first part of my submissions; and, that is, to  
8       explain clearly what the undertaking is which is before  
9       this Board, and to answer the question whether or not  
10      the manner in which it is defined is proper in that it  
11      is a properly classified or constituted class  
12      environmental assessment.

13                   Mr. Chairman, if we look at the  
14      Environmental Assessment Act it is quite clear that  
15      from the Act and from the jurisprudence in relation to  
16      the Act that what it is saying to government is that if  
17      you want to do something which may have environmental  
18      impacts, you cannot do it unless you get approval under  
19      the Act.

20                   And where the proponent wants to do  
21      something, they define what they want to do and they  
22      call it the undertaking, they put it before the  
23      Minister, or if it goes to the Board, the Board and ask  
24      the Board for acceptance of that document and approval  
25      to proceed with the undertaking as defined.



1                   If the Minister finds that the  
2           environmental effects are acceptable, he can approve  
3           it; if he finds that the effects of the undertaking are  
4           not acceptable, he can either not approve it or he can  
5           approve it with terms and conditions, those terms and  
6           conditions being directed to in fact address concerns  
7           they have got about environmental effects.

8                   THE CHAIRMAN: Or amend the undertaking?

9                   MR. FREIDIN: I will get to that later in  
10          my submissions.

11                   I think the important thing for the  
12          purposes of these submissions, Mr. Chairman, is that  
13          the Act does not in any way indicate the level of  
14          detail to which a proponent must have planned the  
15          activities before the Minister of the Environment can  
16          approve the undertaking. That is an important point to  
17          keep in mind throughout my submissions.

18                   If you look at Section 5(3) of the Act,  
19          which basically sets out what the statutory obligations  
20          are on a proponent, you will see that it says you have  
21          got to describe the undertaking, you have to describe  
22          the alternatives to the undertaking and the alternative  
23          methods of carrying out the undertaking and the  
24          potential environmental effects of those 'alternative  
25          to' and alternative methods, and then based on what you

1 submit the Minister, and in the case of the Board, you  
2 make the determination set out under Section 12(2);  
3 that is, whether you accept or the amendment in  
4 acceptance of the environmental assessment and approval  
5 to proceed on terms and conditions. But I will go back  
6 to those three later on in my submissions as they are  
7 three different things that you can do.

8 Now, moving on from the proposition that  
9 the Act does not define the detail to which you must  
10 plan, it is fact that in the past most environmental  
11 assessments have come before the Minister planned to a  
12 level of detail where all the planning is complete.  
13 The planning has been done to the point where there are  
14 detailed specifications, architectural drawings, et  
15 cetera, and the Minister then is reviewing activities  
16 which have been planned to the last detail.

17 And in those situations, Mr. Chairman,  
18 those sorts of environmental assessments have been  
19 called or have become to be known as specific  
20 environmental assessments. I guess they have also been  
21 referred to as individual environmental assessments.

22 In the past, there have also been many  
23 environmental assessments submitted to the Minister  
24 where the level of detail has not been the same, but  
25 because of the circumstances the exact method of

1 implementing the undertaking cannot be identified, and  
2 those have occurred in situations where the specific  
3 time, the specific location and the specific method are  
4 impossible of being defined because the specific time  
5 and the specific location have not been identified, and  
6 until such time as you do that, you can't identify the  
7 specific method.

8 Now, what that means, what's happened in  
9 those class environmental assessments, Mr. Chairman -  
10 and that's what they really are - in those  
11 environmental assessments the Minister of the  
12 Environment requires -- or, pardon me, the Act requires  
13 the proponent to describe the alternatives to and the  
14 alternative methods, which is the requirement under  
15 Section 5(3).

16 And, as I have said, Section 5(3) does  
17 not say that you have to identify the specific method,  
18 it says you have to identify the alternative methods  
19 and identify the potential effects. And in the past  
20 the Minister of the Environment -- and there is nothing  
21 to say that the Minister of the Environment cannot, as  
22 a matter of law, approve an undertaking where the  
23 specific time, location and methods have not been  
24 identified, all the Act says to the Minister is that,  
25 before you can approve activities, the requirements of



1 Section 5(3) must be complied with.

2 Now, what has happened in the past, Mr.  
3 Chairman, is if the proponents have gone to the  
4 Minister of the Environment in situations where they  
5 don't know the specific time and place - whether it is  
6 the construction of roads by the Ministry of  
7 Transportation and Communication which is the subject  
8 matter of a class environmental assessment, or whether  
9 it is timber management - and they have said: Here is  
10 our Environmental Assessment Document, here is the  
11 description which is required by Section 5(3) and, as I  
12 have indicated, the Minister could stop there and could  
13 in fact approve the undertaking with that information  
14 and that information only.

15 However, in the past the Minister of the  
16 Environment has said: Look it, I am not going to grant  
17 you approval for those activities where you haven't got  
18 the specific time, the specific place and the specific  
19 method; he says to proponents: You have complied with  
20 the Act, you have identified the alternative methods,  
21 you have identified all the potential effects of those  
22 alternative methods, you have told me how you can  
23 mitigate those, in the case of a hearing you have heard  
24 from experts and the professionals who actually make  
25 the judgments as to how they will decide between those

1 alternative methods, but what the Minister says is: I  
2 am not going to give you holus bolus approval for those  
3 activities where you can't tell me exactly how you are  
4 going to do it in every specific location at every  
5 specific time.

6 So what he says is: You have complied  
7 with the Act, I give you approval for the undertaking  
8 to carry out those activities, but I am going to impose  
9 a term or condition - which is what his authorization  
10 is under Section 12(2)(e) - and say: Because there may  
11 be a problem in the future, once you do know the  
12 specific time, the specific location and the specific  
13 method, I am going to impose a term and condition on  
14 you which says you have to have - this is the way he  
15 has done it in the past - a planning process which has  
16 at least three elements:

17 You have got to document what you are  
18 going to do, you have got to involve the public so they  
19 know what you are going to do, and you have to have a  
20 provision to deal with the situation where there is  
21 concern about the effects once your specific time, your  
22 specific location and your specific method have been  
23 identified. And the provision that he has imposed is  
24 the provision which has become known as bump-up.

25 So in relation to that last point he is

1 saying: Proponent, you go ahead, but once you know the  
2 specific time, the specific location, the specific  
3 method, document it, tell the public, and if the public  
4 or anybody else has got some concern now about that and  
5 thinks somehow what I heard about alternative methods  
6 and how you go about mitigating just isn't quite enough  
7 in the case, you come back to me, I am the  
8 decision-maker, and I will decide whether further  
9 documentation is required.

10 And if he says further documentation is  
11 required, it has been called -- well, the further  
12 document is done by way of an Environmental Assessment  
13 Document.

14 So in effect what I'm saying now, this  
15 requirement, Mr. Chairman, that the Minister of Natural  
16 Resources has imposed in the past --

17 THE CHAIRMAN: Minister of the  
18 Environment.

19 MR. FREIDIN: Did I say Natural  
20 Resources? --Minister of the Environment has imposed  
21 in the past has not been imposed because it is what the  
22 undertaking is, it's not because the proponent has  
23 sought approval for it, the proponent has sought  
24 approval for the activities, but in the exercise of  
25 his - and the Act talks about approval of undertakings



1       and that's all - but in the exercise of his discretion  
2       under section -- well, in this case the Board, under  
3       Section 12(2) and the Minister under the section that  
4       he deals with - I can't think of it offhand - has  
5       basically said: I will not exercise my discretion and  
6       grant you approval without a term and condition in  
7       those circumstances where you can't identify the  
8       specific time, place, and method.

9                       It would be unreasonable for me to do so,  
10       I don't believe I could stand up and say to the people  
11       of Ontario that I can assure them that environmental  
12       protection will in fact occur. I can only do that if I  
13       build in a safeguard in those situations where the  
14       specific time, location and method aren't known, and he  
15       does that through the method I have indicated, through  
16       saying term and condition, planning process with those  
17       three essential ingredients.

18                      The bottom line, Mr. Chairman, is there  
19       really are not two different types of environmental  
20       assessments, there is only one, and it is an  
21       environmental assessment with the essential ingredients  
22       as set out in paragraph 5(3) of the Act where the level  
23       of detail, as I have indicated, which must be met or  
24       included is not specified.

25                      Let me make my submission perfectly clear

1 by saying if we went to the Minister or we came to this  
2 Board with the undertaking as I defined it the other  
3 day and included -- well, let's not even use... If a  
4 proponent came forward with an undertaking where the  
5 specific method, time and location is not known because  
6 you don't know that it's going to occur in the future,  
7 there is no requirement in the Act to put forward a  
8 planning process, and if the Board or the Minister felt  
9 that in the circumstances it was reasonable to approve  
10 the undertaking, to approve the activities to go ahead  
11 without a planning process, then as a matter of law the  
12 Minister or the Board can exercise its discretion in  
13 that manner.

14 But as I have said, in the last 15 years  
15 the Minister of the Environment has made it quite clear  
16 that he will not exercise his discretion in that  
17 fashion, that he will require a planning process of  
18 some sort with those three essential ingredients in it.

19 And so the proponent in this case, and  
20 the proponent in every case where they can't identify  
21 the specific time, place and method, do in fact put in  
22 their Environmental Assessment Document a planning  
23 process because they know that without it the  
24 discretion the decision-maker has, whether it's the  
25 Board or the Minister, will in all likelihood not be

1 exercised in their favour, they will not get approval  
2 for the undertaking.

3 And, again, I started to say there is  
4 only one kind of environmental assessment that meets  
5 5(3), it is just that they are dealt with a little  
6 differently: Those where in fact you have got it  
7 planned right down to the last detail, there is no  
8 discussion of planning process as a term or condition  
9 because you planned it down to the last detail; where  
10 you haven't done that, as a matter of discretion and as  
11 a matter of imposing a term and condition, a planning  
12 process has usually been required.

13 THE CHAIRMAN: Okay. Mr. Freidin,  
14 without taking issue with what you have said  
15 specifically, why in your opinion, when you take a look  
16 at the definition of 'undertaking' in the Act, Section  
17 1(o) does not the first aspect of what you talked  
18 about; that is, an activity or an undertaking where all  
19 is known, where all of the ingredients are known, it's  
20 not future activity or future actions, it is an  
21 activity about which the time, location, et cetera, is  
22 known, doesn't it fit into the definition where it  
23 says:

24 "The undertaking means an enterprise or  
25 activity..." skip all rest:

1 "...by or on behalf of her Majesty in  
2 right of Ontario by a public body or  
3 public bodies or by a municipality or  
4 municipalities."

5 That takes care of the one situation.

6 And why doesn't the second part of that definition  
7 where it says:

8 "...or a proposal, plan or program in  
9 respect of an enterprise or activity..."

10 et cetera, cover the second situation you dealt with,  
11 the situation whereby not all of those things are known  
12 and, therefore, because they are not known you put  
13 forward a plan, proposal or program in respect of those  
14 activities?

15 MR. FREIDIN: Mr. Chairman, I intend to  
16 address that directly because I know that that was the  
17 proposition that you made the other day. I will  
18 address that in a moment, I don't believe I will deal  
19 with it right now, but I will tell you now that it will  
20 be my submission that it is the choice of the proponent  
21 how to define the undertaking, that I believe and I  
22 will submit to you that whether it's a set of  
23 activities under the first part, whether it's a  
24 proposal in relation to a set of activities in the  
25 second part, or some other definition or justification,



1 the bottom line is the same in terms of the issue that  
2 gave rise to the question in the first place and that  
3 is: How is planning dealt with in an environmental  
4 assessment.

5 If I might continue, I think it will  
6 become quite clear what my submission is.

7 THE CHAIRMAN: Just before you do, just  
8 so you can couch your submissions in light of what I'm  
9 going to say, bear in mind that although the proponent  
10 may have the option of describing the undertaking or  
11 defining the undertaking as the proponent chooses, that  
12 proposition as articulated, as I understand it, by the  
13 court in the southwest Ontario Hydro case, may be  
14 distinguishable in circumstances where the proponent  
15 has in fact led evidence and included within its  
16 environmental assessment elements of a planning nature  
17 or a program nature or a proposal nature but then  
18 chooses later on to restrict the definition of the  
19 undertaking to something other than what in fact the  
20 proponent has done.

21 In other words, you may have the option  
22 to define it, but when through your actions and when  
23 through your compiling your environmental assessment  
24 document you do otherwise, I would suggest to you you  
25 may not necessarily have the option to characterize the

1       undertaking in a fashion differently than what you have  
2       put forward to the Board.

3                       MR. FREIDIN: I will deal with it in my  
4       submissions, but I will just tell you right now, Mr.  
5       Chairman, if you are suggesting by putting forward  
6       evidence of a planning process in the environmental  
7       assessment document that that in some way makes the  
8       undertaking include the planning process, I strongly  
9       submit that that is not a valid proposition of law,  
10      that the planning process is put forward in the  
11      environmental assessment document because, by means of  
12      past practice, we know that approval for the  
13      undertaking will not likely be given without a term or  
14      condition which outlines a planning process, and why  
15      would a proponent ever in those circumstance come to a  
16      Board and ask for approval without putting forward its  
17      own suggestion as to what a reasonable term and  
18      condition would be on planning, rather than just  
19      saying: Well, no, you design it yourself, and that is  
20      why it is, and I will get to that in further detail in  
21      a moment.

22                      THE CHAIRMAN: Well, you may not get  
23      approval of the undertaking if an undertaking cannot be  
24      put forward without a planning process and,  
25      consequently, the fact that a planning process is

1       necessary in terms of a specific type of undertaking,  
2       one where those elements are unknown as you have  
3       referred to, may nevertheless render the undertaking to  
4       include a planning process in respect of certain  
5       activities.

6                       MR. FREIDIN: I disagree with you, I  
7       don't believe that that is an interpretation which the  
8       statute in fact would support. And if I can continue,  
9       I will attempt to convince you of that.

10                      Having indicated that this thing called a  
11       class environmental assessment is really nothing magic,  
12       that rather it's just an environmental assessment where  
13       some element of planning is going to take place in the  
14       future, I find support in the general guideline for the  
15       preparation of environmental assessments issued by the  
16       Environmental Approvals Branch in January, 1981, at  
17       pages 15 to 18.

18                      On page 15 they define undertaking, they  
19       repeat Section 1(o) of the Act, and they say in plain  
20       terms: The undertaking is whatever the proponent is  
21       asking approval for.

22                      More importantly, under the heading of  
23       Specific versus Class Undertaking, it says:

24                      "Undertakings can be put forward on  
25       either a specific (sometimes termed an

1 individual) or on a class basis. A  
2 specific undertaking is one put forward  
3 by the proponent based on a  
4 decision-making process which has already  
5 been carried out."

6 Underline already been carried out.

7 "A class undertaking is one in which  
8 the proponent asks for approval of the  
9 undertaking..." and then it says:  
10 "...based on a decision-making process  
11 which he describes now but which he  
12 proposes to carry out in the future."

13 The fundamental difference between the  
14 two types of undertaking is, therefore, a specific  
15 undertaking is one in which the time when and the place  
16 where it is to be carried out are specified in the  
17 environmental assessment; a class undertaking is not  
18 specific as to time and place.

19 So to go back, it says:

20 "A class undertaking is one where you ask  
21 for approval of the undertaking..." the  
22 undertaking:

23 "...as defined by the proponent."

24 And then it says:

25 "...based on a decision-making process



1                   which he describes now but which he  
2                   proposes to carry out in the future."

3                   Now, these are just guidelines of course  
4           issued by the Environmental Assessment Branch, Mr.  
5           Chairman, but in my submission that supports the  
6           distinction that I have made, the distinction between  
7           the undertaking which is defined by the proponent and  
8           for which approval is sought under the Act, and a  
9           planning process which you believe would be a  
10          reasonable term or condition to be imposed in order to  
11          get that approval.

12                   Having made those submissions, Mr.  
13          Chairman - and I'm going to get to the alternative ways  
14          of defining the undertaking - I will tell you now that  
15          the Ministry of Natural Resources defines the  
16          undertaking in the manner I indicated the other day,  
17          that it is timber management which consists of the  
18          activities of access, harvest, renewal and maintenance  
19          as more fully explained in the environmental assessment  
20          document that we have -- that planning does not form  
21          part of the definition of that undertaking, and that  
22          for the reasons that I have given, the class  
23          environmental assessment with that definition of the  
24          undertaking is in fact a properly constituted  
25          environmental assessment.

1                   And because I have made the submission  
2           that there is only one type of environmental  
3           assessment, I really don't have to say it is a properly  
4           constituted class environmental assessment, but if it  
5           makes any difference, I think based on my submissions I  
6           would submit, if I have to, that it is properly  
7           constituted as a class environmental assessment.

8                   Now, Mr. Chairman I think that a lot of  
9           the parties, perhaps the Board - and when I say parties  
10          I include the Ministry of Natural Resources - have been  
11          guilty on occasion from using words which have specific  
12          legal significance, but using them in a colloquial  
13          sense and I think in some respect that has given rise  
14          to a confusion as to what is before the Board for  
15          approval.

16                   Firstly, you asked a question the other  
17          day: Surely, Mr. Freidin, the planning process is  
18          before us for approval. And I said: No, no, it's not.  
19          And I still say as a matter of law under the  
20          Environmental Assessment Act, for all the reasons I  
21          stated, based on the submissions I have made, the  
22          planning process is not before the Board for approval  
23          in the legal sense. Under the Environmental Assessment  
24          Act what is before the Minister or the Board for  
25          approval is approval for the undertaking.

1 THE CHAIRMAN: Okay. Mr. Freidin, just  
2 going back one second. If you included in your  
3 definition of the undertaking a planning process in  
4 respect of the four activities, would the planning  
5 process then, in your view, be before the Board for  
6 approval?

7 MR. FREIDIN: I suppose --

8 THE CHAIRMAN: As well as the activities  
9 because the planning process is in respect of those  
10 activities?

11 MR. FREIDIN: I don't think it would be  
12 properly before you, Mr. Chairman, because in my view  
13 the Act contemplates undertakings, in fact defining  
14 activities which have potential environmental impacts.  
15 A planning process with respect, Mr. Chairman, I could  
16 sit and my client could sit and plan for 50 years and  
17 there would be no environmental impacts.

18 So, in my view, planning processes are  
19 not contemplated as the proper subject matter of an  
20 undertaking. But for the purposes of answering your  
21 question, keeping in mind my submissions, if we in fact  
22 said that planning was part of the definition, I  
23 suppose it would be part of the definition because we  
24 said so. Whether that would be proper under the  
25 Environmental Assessment Act is quite another story and

1       you have got my submissions on that.

2                   THE CHAIRMAN: All right. Mr. Freidin,  
3       you are going to have to tell me plainly what the words  
4       in 1(o) mean that state:

5                   "...or a proposal, plan or program in  
6               respect of an enterprise or activity."

7                   What does that phrase mean? You are  
8       telling me that it can't include a planning process,  
9       and I'm saying to you that those words to me purport to  
10      include a planning process in respect of an enterprise  
11      or activity. Irrespective how you want to categorize  
12      it, what do those words in the Act mean?

13                  MR. FREIDIN: Mr. Chairman, with the  
14      greatest of respect, the fact that you and I and other  
15      people may have some question in our minds what those  
16      sections mean or what those words mean, does not mean  
17      that a class environmental assessment has got to  
18      somehow fit into those words.

19                  I'm submitting to you that the way we  
20      have defined the Act -- defined the undertaking falls  
21      within the provisions of the definition section. The  
22      way we have done it is because we have defined  
23      activities that we want to seek approval for, and the  
24      fact that we may not know what those other words mean  
25      is of no consequence, in my respectful submission, in



1 the context of these submissions.

2 I will in fact make an alternative  
3 argument in a moment, that if you believe that it's got  
4 to fall within the last part of the definition, that it  
5 doesn't cause me a heck of a lot of problem, but I will  
6 be making the submission that by looking -- or by going  
7 to the last part of the definition does not bring  
8 planning into this environmental assessment as part of  
9 the definition of the undertaking.

10 I will be making submissions that  
11 regardless of how you define the undertaking, whether  
12 it's under the first part or the second part, planning  
13 does not become part of the undertaking. I will  
14 indicate later in my submissions why that is an  
15 important point to make in terms of what is expected of  
16 proponents in environmental assessments, just so you  
17 know where I am going.

18 THE CHAIRMAN: Okay. Well, I understand  
19 I think fairly well where you are going, but I would  
20 like to know what those words mean, and obviously when  
21 legislators put wording in a statute they don't do so  
22 in a superfluous manner, they don't do so for no  
23 purpose whatsoever. They must have intended that the  
24 words 'an enterprise or activity' is something  
25 different from a proposal, plan or program in respect

1 of an enterprise or activity, or I suggest to you the  
2 latter part of the definition would not be contained in  
3 the statute.

4 MR. FREIDIN: I agree.

5 THE CHAIRMAN: Okay.

6 MR. FREIDIN: I agree.

7 THE CHAIRMAN: Therefore, we are at least  
8 agreed on something. The second proposition I would  
9 like to put forward to you is the fact that if in fact  
10 it means something, then why cannot the second part of  
11 the definition include a planning process in respect of  
12 activities?

13 MR. FREIDIN: Can I deal with that later,  
14 but I will make a note of it: Why can't planning  
15 process be part of the last part of the definition. Is  
16 that your question?

17 THE CHAIRMAN: In respect of certain  
18 activities or an enterprise.

19 MR. FREIDIN: Why can't a planning  
20 process in respect of activities...

21 THE CHAIRMAN: No, why can't a planning  
22 process--

23 MR. FREIDIN: Right.

24 THE CHAIRMAN: --be part of the  
25 undertaking in respect of certain activities.

1                   MR. FREIDIN: Okay. I will not avoid  
2                   that question, but I would like to address it later in  
3                   my submissions.

4                   I tried to say that a lot of us have been  
5                   using language perhaps not as precisely as we might,  
6                   and you have asked me: Well, isn't the planning  
7                   process before us for approval. I hope we now  
8                   understand why I've said it's not -- pardon me, you  
9                   said: Is it not before us, and I am saying: Yes, it's  
10                  before you, you can render a decision which has all  
11                  kinds of things in it about the planning process, but  
12                  it is not before you for approval under the Act.

13                  THE CHAIRMAN: I am saying it could be  
14                  before us for approval if it is a plan or planning  
15                  process in respect of named activities--

16                  MR. FREIDIN: All right.

17                  THE CHAIRMAN: --as part of the  
18                  undertaking.

19                  MR. FREIDIN: The reasons I have  
20                  indicated, I want you to understand why I have always  
21                  said that it's before you, it's not before you for  
22                  approval.

23                  In the same vein, Mr. Chairman, in the  
24                  Class Environmental Assessment Document and in the  
25                  witness statement for Panel 17 there is a section

1       called Justification for Class EA. I think some people  
2       look at that and they say: You are talking about the  
3       legal justification for a Class EA.

4                       I am submitting to you it's not the legal  
5       justification for a Class EA as being an animal  
6       distinct from an individual EA. That whole section  
7       called Justification for Class EA are the reasons that  
8       the proponent feels that it is justified to give  
9       approval for activities where the specific method, the  
10      specific time and the specific place cannot be  
11      identified, is because the activities are recurrent,  
12      they occur everywhere, they occur in the similar  
13      fashion, they have predictable range of effects, et  
14      cetera.

15                    THE CHAIRMAN: And I go back; and,  
16      therefore, why isn't it just as reasonable to define  
17      the undertaking in terms of the latter part of the  
18      definition for those precise reasons?

19                    MR. FREIDIN: I will get to that in a  
20      moment.

21                    Before I indicate what alternative  
22      interpretations of the Act can be provided which  
23      justify this thing called Class EA: Why do you ask for  
24      approval of an activity where you don't identify  
25      precisely what it is you are going to do at a specific



1       time and place.

2                       I want to make it quite clear, Mr.  
3       Chairman, that you and the parties have extremely wide  
4       powers to deal with or to fashion a planning process,  
5       that your powers and the rights of parties to make  
6       suggestions about planning processes is not fettered or  
7       limited.

8                       On the one hand, if planning is part of  
9       the undertaking on one hand or planning and planning  
10      requirements are suggested and imposed as terms and  
11      conditions under paragraph 12(2)(e) - I believe this  
12      was the submission made by Ms. Seaborn the other day  
13      with which I concur - people can come forward and make  
14      suggestions that the planning process is not sufficient  
15      regardless of whether planning is part of the  
16      undertaking or whether they think it would be a  
17      reasonable term or condition.

18                      Under section 12(2), the Board can  
19      approve the undertaking, approve you to proceed with  
20      the undertaking and also under (e) whether the approval  
21      should be given subject to terms and conditions; and,  
22      if so, the provisions of such terms and conditions.

23                      If I might, I think that the submissions  
24      I have made, in my submission, justify this being an  
25      appropriate class environmental assessment with the

1 definition of undertaking as I have indicated.

2 THE CHAIRMAN: Would it be an appropriate  
3 class environmental assessment with the undertaking  
4 defined as we have suggested--

5 MR. FREIDIN: As you have suggested?

6 THE CHAIRMAN: --in the latter part of  
7 the definition?

8 MR. FREIDIN: If we defined the  
9 undertaking to be a proposal, I will take that part, in  
10 relation to a set of activities, I think I could --  
11 that is one of the alternative arguments I am going to  
12 make, so I will simply make it now, that we could refer  
13 to it or describe it as that.

14 THE CHAIRMAN: Okay. Just a minute. You  
15 are going to describe it as a...?

16 MR. FREIDIN: A proposal in relation to a  
17 set of activities.

18 THE CHAIRMAN: And you believe that  
19 within the term 'proposal' is contained the planning  
20 process that you have put forward?

21 MR. FREIDIN: I do not. My submissions  
22 do not change, planning is not part of the undertaking.  
23 Even if it is defined as a proposal in relation to a  
24 set of activities, it will still --

25 THE CHAIRMAN: What if you define it as

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THE CHAIRMAN: That may be the case, but

1        what if it weren't detailed down to the last nail, what  
2        if in fact you are dealing with future occurrences of  
3        which some elements are unknown, why can't you have a  
4        planning process defined within the terms the four  
5        corners of the word 'proposal'.

6                    I am not disagreeing with you, you could  
7        have a proposal that is fixed in all respects, but why  
8        can't you have a proposal that is unfixed in some  
9        respects and, in effect, constitutes a planning  
10       process?

11                   MR. FREIDIN: But I think you are really  
12       begging the question, the real question is: Do you  
13       have to define or include as part of the definition the  
14       planning process. And I say, no, as a matter of law  
15       you do not, but that does not mean that you don't get  
16       into a discussion about the planning process, Mr.  
17       Chairman.

18                   THE CHAIRMAN: You indicated that the  
19       Minister in the past has taken a view of matters where  
20       certain elements were unknown and has required some  
21       kind of planning process to be addressed.

22                   MR. FREIDIN: Yes.

23                   THE CHAIRMAN: Otherwise he won't render  
24       approval.

25                   MR. FREIDIN: Yes.



1                   THE CHAIRMAN: Now, I ask you this  
2 question: Does the Board have to follow the same  
3 rationale used by the Minister in the past when it  
4 wishes to consider what elements are necessary for  
5 approval in the context of your application?

6                   MR. FREIDIN: And what do you mean  
7 'consider the same things as the Minister'?

8                   THE CHAIRMAN: In other words, for  
9 instance, could the Board decide to approve the four  
10 named activities in the absence of a planning process  
11 being put forward?

12                  MR. FREIDIN: Oh, certainly, of course  
13 you can.

14                  THE CHAIRMAN: And can the Board refuse  
15 to approve the activities unless a planning process is  
16 put forward?

17                  MR. FREIDIN: Not on a legal basis, no.  
18 What you do is, you impose as a term and condition a  
19 reasonable planning process. If we didn't put one  
20 forward I suggest to you, Mr. Chairman, that other  
21 people would be here telling you that you better have  
22 one or you don't grant approval, and you would fashion  
23 one yourself.

24                  You can't turn down the undertaking  
25 because some legal requirement of a planning process

1       has not been put forward. You might say to the  
2       proponent: If you don't put one forward I am not  
3       granting approval. That is something quite different.

4               THE CHAIRMAN: Unless, unless you have  
5       defined the undertaking as requiring a planning process  
6       in relation to the activities.

7               MR. FREIDIN: Which we have not and  
8       which, in my respectful submission, you cannot imply as  
9       a legal requirement by going to the last part of the  
10      definition of undertaking in the Act.

11              And, Mr. Chairman, let me tell you what  
12      the practical significance is of dealing with it the  
13      way you have suggested it might be, and I don't in any  
14      way sort of recant from the submissions I have made as  
15      I have. As I understand your comments the other day -  
16      and I think perhaps you are correct - that if a  
17      planning process was identified as part of the  
18      undertaking - and it hasn't been - assuming it was,  
19      then it is an alternative method. If it is an  
20      alternative method, then as I read Section 5(3) of the  
21      Act there would be a requirement on proponents to  
22      identify, analyse different methods; i.e., alternative  
23      methods; i.e., alternative planning processes to  
24      rationalize its choice as to what it was putting  
25      forward.

1                   In my submission, Mr. Chairman, you have  
2 my submissions as to why it is not part of the  
3 undertaking and, therefore, why it's not an alternative  
4 method, and I would just comment that that is a  
5 practical consequence of defining it or imputing a  
6 requirement that the planning process be part of the  
7 definition of undertaking. That is the practical  
8 consequence -- a practical consequence of what would  
9 occur, and although it is not the necessary answer to  
10 the question, I find some comfort in the fact that  
11 environmental assessments in the past which have been  
12 characterized as class environmental assessments have  
13 not put forward alternative planning processes.

14                   If it was the view of the Minister of the  
15 Environment that such environmental assessments with a  
16 specific time and location and place had not been  
17 identified that you had to, as a matter of law, include  
18 planning processes as part of the undertaking, class  
19 environmental assessments submitted in the past would  
20 have been turned down as being unacceptable because  
21 they would not have complied with the essential  
22 ingredients of Section 5(3) which requires you to  
23 identify alternative methods.

24                   So I find comfort in the fact that  
25 environmental assessments for the past 15 years in this

1 province have not required such alternative methods or  
2 planning processes to be identified. And I believe  
3 that Mr. Campbell will speak to this matter when he  
4 makes his submissions, I understand. I have nothing  
5 else to say about that.

6 Now, that is the significance of my  
7 submission -- well, pardon me.

8 I would like to indicate now one other  
9 way of justifying class environmental assessment. We  
10 sort of talked about the way I do it, which is  
11 statutory interpretation which is the statutory  
12 underpinning, we've talked about whether you can work  
13 it into Section 1, and I have made my submissions on  
14 that, you can also go to Section 41 of the Act.

15 Section 41 of the Act - it is on page 23  
16 of the consolidation - says:

17 "A class of undertakings under this Act  
18 may be defined with respect to any  
19 attribute, quality or characteristic or  
20 combination thereof."

21 Mr. Chairman, a class of undertakings may  
22 be defined with respect to any attribute or attributes,  
23 quality or qualities. That section, in my submission,  
24 would justify what has become known as a class  
25 environmental assessment on the following rationale or



1       logic. Let me use as an example a capital project as  
2       opposed to the one which is before us to try and  
3       demonstrate the point.

4                   If one had a number of nuclear power  
5       plants that you wanted to build, one proponent, and  
6       they were all going to be designed exactly the same,  
7       they all had similar attributes, they all were in  
8       similar situations, they were 150 miles from any  
9       population, et cetera, you could lump those  
10      undertakings, those specific projects into a class -  
11      and let me use the word group instead of class because  
12      I think this word class is confusing - you could take  
13      these undertakings and put them into a group and say:  
14      I want approval for the group of undertakings because I  
15      have defined those undertakings with respect to certain  
16      attributes, qualities or characteristics. So in that  
17      case you would go ahead, I want approval for five of  
18      these things as a group or as a class.

19                   Now, taking that submission and applying  
20      it to timber management, timber management has been  
21      described as an undertaking. The undertaking takes  
22      place on 99 management -- or 96 maybe management units  
23      in the area of the undertaking. You have heard the  
24      evidence as to why we describe that undertaking,  
25      regardless of where it occurs, it has certain common

1 attributes, qualities and characteristics, which I will  
2 not repeat; and, therefore, under Section 41 we have  
3 defined a class or group of undertakings; i.e., timber  
4 management in 96 units, and are asking for approval of  
5 those.

6 THE CHAIRMAN: But what does timber  
7 management mean in the abstract?

8 MR. FREIDIN: Timber management, I am not  
9 sure whether -- first of all, I am not sure why you ask  
10 what it means in the abstract. Timber management means  
11 what we have defined it to be.

12 THE CHAIRMAN: But it is in relation to  
13 certain activities; is it not?

14 MR. FREIDIN: Timber management is the  
15 conduct of the four activities.

16 THE CHAIRMAN: Right. It's the way in  
17 which the four activities are carried out.

18 MR. FREIDIN: Exactly.

19 THE CHAIRMAN: And there is a planning  
20 process involved in terms of the manner in which you go  
21 about carrying out those activities.

22 MR. FREIDIN: There is a planning process  
23 which results in the decision or which -- is the  
24 framework within the decision is made as to how you are  
25 going to carry them out.

1 THE CHAIRMAN: The activities are carried  
2 out.

3 MR. FREIDIN: Agreed. But, in my  
4 submission, that does not mean that planning becomes  
5 part of the undertaking for all the reasons I have  
6 indicated. So even under this definition planning does  
7 not become part of the undertaking -- well, and you  
8 have my submissions.

9 MR. MARTEL: And there is so many terms  
10 and conditions with respect to the planning?

11 MR. FREIDIN: You can put any terms or  
12 conditions -- you can formulate whatever planning  
13 process you believe is required under Section 12(e).  
14 You just don't do it because it is before you for  
15 approval as part of the undertaking.

16 You are going to be limited obviously by  
17 any restrictions that are imposed on you by law as to  
18 how far you can go. I mean, you can't obviously put in  
19 the planning process that somebody is going to go to  
20 jail for six years if they knock, you know, down to the  
21 lake - I mean, you can't sort of start making criminal  
22 law - but within the bounds of law you can do anything  
23 you want in terms of forging or designing that planning  
24 process.

25 And your powers are no different, they

1       are no different; if on the one hand you are doing it  
2       because it is a reasonable term and condition, or  
3       whether you are doing it because it is part of the  
4       undertaking, no different at all.

5                       And, as I indicated before, you could  
6       carry out these activities in the forest without any  
7       planning, and in fact, you know, we don't do it that  
8       way, the Ministry doesn't do it that way.

9                       THE CHAIRMAN: And that's not what you  
10      have put forward.

11                      MR. FREIDIN: That's correct. The  
12      planning process is before you, the planning process is  
13      not before you for approval.

14                      THE CHAIRMAN: What do the words in the  
15      last part of the definition mean?

16                      MR. FREIDIN: I am not sure I can answer  
17      that, but I don't think my ability to answer that  
18      affects my submissions at all, Mr. Chairman.

19                      THE CHAIRMAN: Well, just out of  
20      curiosity.

21                      MR. FREIDIN: Well, all right, which part  
22      then?

23                      THE CHAIRMAN: "The proposal, plan or  
24      program in respect of an enterprise or  
25      activity..."



1                   And when you then go over to Section 3,  
2                   the Act applies to enterprises or activities or  
3                   proposals, plans or programs in respect of enterprises  
4                   or activities, et cetera.

5                   MR. FREIDIN: Can I just have just one  
6                   sec. I think maybe I am going to say you should ask  
7                   Mr. Campbell.

8                   ---Discussion off the record

9                   MR. FREIDIN: Mr. Chairman, I am going to  
10                  pass that one off to Mr. Campbell. I don't believe -  
11                  well, you will hear whether he supports my submissions  
12                  or not when he does - but I don't believe, and I  
13                  repeat, the curiosity in relation to what those words  
14                  mean should have any bearing on the decision that you  
15                  make on these submissions.

16                  I have given to you three different ways  
17                  in which class environmental assessment is justified.  
18                  I have agreed with you that -- or I have indicated even  
19                  if the undertaking were a proposal in relation to a set  
20                  of activities, that does not impute or make the  
21                  planning process as part of the undertaking. Planning  
22                  processes are still dealt with as terms and conditions  
23                  or possible terms and conditions under 12(e).

24                  THE CHAIRMAN: Okay. Are you denying  
25                  that planning process could be dealt with as part of

1 the undertaking?

2 I know you don't, in this case you are  
3 saying you don't, but are you taking the position that  
4 a planning process cannot, as a matter of law, be dealt  
5 with as part of the undertaking?

6 MR. FREIDIN: I repeat what I said  
7 before. Somebody might want to put that forward under  
8 the Act, I have grave reservations as to whether that  
9 would be a proper undertaking because of what I said  
10 before: You can plan until you are blue in the face  
11 and there are no environmental impacts, and if that's  
12 all you put forward, there are no environmental impacts  
13 of planning.

14 The environmental impacts are the result  
15 of, or the potential environmental effects are the  
16 result of the activities that you are going to carry  
17 out and how you are going to carry them out, not how  
18 you plan.

19 THE CHAIRMAN: Why can't the  
20 environmental impacts be as a result of a planning  
21 process in respect of activities?

22 MR. FREIDIN: Because the --

23 THE CHAIRMAN: Not environmental impacts  
24 as a result of planning alone, but as a result of a  
25 planning process in respect of activities.

1                   MR. FREIDIN: Because the planning  
2 process -- to do that, Mr. Chairman, you are imputing,  
3 you are taking the words proposal, plan or program and  
4 now you are making it a planning process in relation to  
5 a set of activities. Those words aren't there, and I  
6 would submit that you can't take the words proposal,  
7 plan or program and then change them and say: Well, or  
8 planning process.

9                   THE CHAIRMAN: Well, why can't a proposal  
10 include a planning process in respect of activities?  
11 Why can't the word 'program' include a planning process  
12 in respect of activities?

13                  MR. FREIDIN: Well, Mr. Chairman, I think  
14 you have my submissions as for why it cannot, and I  
15 again indicate, I don't believe you have to answer the  
16 question that you have posed for the purposes of this  
17 matter.

18                  Now, what is the significance of the  
19 submission on Panel 17 cross-examination and what's the  
20 significance, if any, for these submissions on the  
21 issue of licensing that we dealt with before.

22                  In relation to Panel 17, Mr. Chairman, in  
23 the cross-examination, it is my respectful submission  
24 that the planning processes -- the planning process or  
25 alternative planning processes are not properly the

1 subject matter of cross-examination in Panel 17  
2 regardless of how the definition of undertaking is  
3 finally resolved.

4 And I make that submission even if, even  
5 if the undertaking was found to include the planning  
6 process, and I make that submission on the following  
7 basis: (1) if planning is not part of the undertaking,  
8 then planning cannot be -- we are dealing with  
9 alternatives to the undertaking, we are not dealing  
10 with suggestions regarding terms and conditions that  
11 should be imposed in relation to a planning process.

12 If somebody wanted to, and many people  
13 did, want to suggest there was something wrong with the  
14 planning process put forward by the Ministry and make  
15 suggestions by way of cross-examination that it should  
16 be different, which they did, they do that in Panel 15  
17 which dealt with planning.

18 They cross-examined in Panel 15 on other  
19 possible planning approaches, they lay the groundwork  
20 for their own evidence, and they call that evidence in  
21 their own case, that different terms and conditions in  
22 relation to planning would be more appropriate than the  
23 ones put forward by the proponent.

24 So if you accept my submissions, planning  
25 is not a subject matter for Panel 17.



1                   Now, Mr. Chairman, even if planning  
2 becomes part of the undertaking and, as I understand  
3 it, it would be my submission it would be no more than  
4 a method of implementing the undertaking, that's the  
5 manner I think in which you have characterized it. As  
6 you know, I don't accept that proposition, but even if  
7 that was the determination, it is still only a method.

8                   Alternative methods of carrying out the  
9 undertaking are different than alternatives to the  
10 undertaking, and if one believed that planning  
11 processes were alternative methods then, with respect,  
12 the alternative methods should have been dealt with and  
13 been the subject matter of cross-examination in the  
14 panel which dealt with that method, and that obviously  
15 was Panel 15.

16                   Nobody, in my submission, would be  
17 prejudiced one iota if you accept my proposition  
18 because there has been cross-examination in Panel 15 on  
19 other planning processes and approaches. The  
20 groundwork, in my respectful submission, has been laid  
21 for other parties' own cases to call evidence regarding  
22 different approaches for the planning of timber  
23 management.

24                   The second question I posed was: Well,  
25 what relevance does this submission have, if any, to

1 the licensing issue. I will not repeat my submissions,  
2 Mr. Chairman, but I only wanted to raise that matter  
3 because during those submissions you were asking  
4 whether we could get into licensing under 1(o) because  
5 part of what had been forward as the undertaking was a  
6 planning process, or a planning framework in relation  
7 to a set of activities.

8 You have my submission on that, and  
9 because of my submissions I submit to you that it would  
10 be improper for you to find that licensing was properly  
11 the subject matter of debate because it was part of a  
12 planning system which had to be part of the  
13 undertaking.

14 Now, I have a little thing here: Why am  
15 I making an issue of this if, in the bottom line, you  
16 have got the same powers in relation to the planning  
17 process. I think I have indicated there is a  
18 difference as to whether it is an alternative method.  
19 So I won't repeat that.

20 I have made the point there is a  
21 difference between matters which are before you and  
22 matters which are before you for approval.

23 And I think the last point I want to make  
24 is the comment that you made the other day about: Take  
25 a look at your own term and condition 59. Mr.

1 Chairman, I think you indicated that it was sort of  
2 perhaps contrary to the submission that I have made  
3 today, where it says:

4 "Amendments may be required to the  
5 approval for this undertaking..." and it  
6 goes on and lists a number of things. I have taken a  
7 look at that. I agree that there is room for confusion  
8 having the way it is worded. I think that perhaps  
9 there is even room for some ambiguity even the way we  
10 amended it the other day by changing the word  
11 'undertaking' to 'approval for the undertaking'.

12 I say to you now that the position of the  
13 proponent is as I have explained it today, that we will  
14 have to, and we will, revisit the wording of our terms  
15 and conditions, and particularly 59, and change the  
16 wording so that it is clear that our intention is what  
17 I have said today so that there is no ambiguity.

18 Mr. Chairman, you made a comment - and  
19 this is my last submission - you made a comment the  
20 other day that this was an important issue, that you  
21 felt that you might in fact grant a decision and deal  
22 with reasons later.

23 If it was your preference to deal with  
24 the matters together, then from my point of view I  
25 don't see that there is a necessity to determine this

1 issue of the class environmental assessment. If you  
2 accept that you can't deal with alternative planning  
3 approaches either way, whether it is terms and  
4 conditions or whether it is an alternative method, as  
5 you have indicated, then I don't see that there is a  
6 rush or a great rush for you to issue a decision before  
7 Panel 17 cross continues on whether in fact the  
8 definition of 'undertaking' is correct and whether or  
9 not it is properly a class environmental assessment.

10 I have already indicated to you, I don't  
11 think these submissions should affect the scope of the  
12 cross-examination of Panel 17. I just make that  
13 observation, that if you wanted to deal with reasons  
14 and a decision together, I think you have got the time  
15 do that, that you don't have to make a decision on the  
16 matter that I am addressing right now today.

17 Now, other people can make comment on  
18 that. That's how I see it from where I stand, and  
19 other people may have something to say about that.

20 I think those are my submissions, subject  
21 to any questions you have.

22 THE CHAIRMAN: Okay.

23 MRS. KOVEN: Mr. Freidin, could you go  
24 over for me again the practical significance of  
25 defining planning as part of the undertaking.



1 MR. FREIDIN: Okay.

2 MRS. KOVEN: And are you saying that in  
3 fact if the undertaking were defined to include  
4 planning that your EA would be inadequate because you  
5 have not looked at alternatives to the planning method  
6 you've proposed?

7 MR. FREIDIN: Okay. You are right that  
8 if planning is part of the undertaking it would become  
9 one of the methods which, under the Act, would require  
10 us to identify alternative methods and indicate why we  
11 chose the one we did.

12 To answer your question: Would our  
13 environmental assessment be unacceptable because we  
14 didn't do that should you decide that planning is part  
15 of the undertaking, my answer is no.

16 And the reason I say no is that, you will  
17 recall the evidence in Panel No. 1 and, particularly  
18 through Mr. Douglas, where in a number of documents  
19 there was an outline of different planning approaches,  
20 totally integrated plans, doing all the planning  
21 together in one plan for every resource and identifying  
22 the objectives, doing it the way the Ministry does it,  
23 et cetera. He went on at some length on that to sort  
24 of provide some background.

25 So there is evidence before you that

1 indicates what other planning approaches had been  
2 considered by the Ministry generally, and even I think  
3 that document and the evidence indicates why we do it  
4 the way we do it. That was also the subject matter of  
5 extensive cross-examination.

6 So to answer the question from a legal  
7 point of view: Should our assessment be found to be  
8 unacceptable because we didn't address that essential  
9 ingredient, the answer is no, we have.

10 The submission, though, is being made  
11 because it has relevance not only for this hearing but,  
12 as I have indicated, it would have significance in  
13 terms of what proponents in the future must do in order  
14 to comply with the Act.

15 We are saying that you don't have to have  
16 done -- you do not have to put forward those different  
17 planning processes. We happen to have done that in  
18 this case, but we are saying as a matter of law you  
19 don't have to do it.

20 If you agree, then obviously it would be  
21 our submission you shouldn't make a decision which  
22 would, as a matter of law in the decision of this  
23 Board, say you have to do it, because that will affect  
24 future environmental assessments, class environmental  
25 assessments that are put forward and that, in our view,

1 is not the intention of the Act and, of course, we will  
2 have to hear from the Ministry of the Environment in  
3 relation to that matter.

4 THE CHAIRMAN: Mr. Freidin, following up  
5 on Mrs. Koven's question, would you also agree that had  
6 you not covered alternative planning methods in your  
7 own evidence that nevertheless any deficiency which  
8 might have arisen, assuming you had not covered it,  
9 could nevertheless be addressed by other parties in the  
10 course of their evidence?

11 MR. FREIDIN: Yes, that's true.

12 THE CHAIRMAN: Okay. Thank you.

13 MR. FREIDIN: Those are my submissions.  
14 Thank you, Mr. Chairman.

15 THE CHAIRMAN: I think we will take a  
16 20-minute break at this time.

17 Mr. Campbell, we will call upon you after  
18 the break.

19 MR. CAMPBELL: I would prefer, Mr.  
20 Chairman --

21 THE CHAIRMAN: To go after everybody  
22 else?

23 MR. CAMPBELL: Adopt my usual position.

24 MR. CASSIDY: Mr. Chairman, perhaps both  
25 of us are going to have the same submissions, that I

1 think the non-government intervenors in this hearing  
2 may not wish to be sandwiched between two ministries  
3 who we assume they are going to agree and I have had  
4 some discussion with Mr. Campbell on that, but I think  
5 it would be helpful for the non-government intervenors  
6 to have the benefit of having the whole governments'  
7 view, if you will, to the extent that we can get it in  
8 this hearing before - and I mean no slight on either  
9 either counsel here - before we make our remarks.

10 MR. LINDGREN: I agree with Mr. Cassidy's  
11 submission, Mr. Chairman. I would add one thing; and,  
12 that is, on a question of such fundamental importance I  
13 think it would be reasonable for this Board to require  
14 parties in support of the Ministry's position to go  
15 ahead of those in opposition. And perhaps it might be  
16 necessary to canvass the parties on that issue.

17 THE CHAIRMAN: Well, I think the Board  
18 agrees that this is an issue of some importance and one  
19 which particularly the two ministries have had to  
20 address, and more particularly the Ministry of the  
21 Environment would have had to have addressed in  
22 accordance with the Board's directions, and I think it  
23 would be fairer, frankly, for the other parties to have  
24 the advantage of knowing what the Ministry of the  
25 Environment's position is prior to having to put



1 forward their positions on the record.

2 I think therefore, Mr. Campbell, we will  
3 call upon you after the break to go forward. If it  
4 becomes necessary, after hearing submissions from other  
5 parties, we may consider offering a further submission  
6 on behalf of either or both ministries after they have  
7 heard the other parties as well.

8 MR. CAMPBELL: Mr. Chairman, that's fine.  
9 Part of my concern about this is that I have discussed  
10 these questions both with Mr. Cassidy and with Mr.  
11 Lindgren in advance of today's proceedings, I have  
12 outlined our position, they have quite fairly outlined  
13 their positions on the matter as well, and I know that  
14 Mr. Lindgren intends to raise one argument which was  
15 not discussed at all by Mr. Freidin, and I would have  
16 to anticipate what Mr. Lindgren is going to say in  
17 order to deal with that in my submissions.

18 Subject to being permitted to address  
19 matters which have not been raised in our submissions  
20 following those, then I would be perfectly satisfied,  
21 but I know there are going to be some new matters that  
22 come up.

23 THE CHAIRMAN: Well, we will attempt to  
24 cover those off by allowing the parties to whom they  
25 are addressed, whether it is Mr. Freidin and/or the

1 Ministry of the Environment, to reply to those  
2 submissions, but I think it would be helpful if  
3 everybody had on the record the Ministry of the  
4 Environment's position before going forward.

5 MR. CAMPBELL: That's fine. And I know  
6 the matters that Mr. Lindgren intends to address are  
7 matters of statutory interpretation not specifics on  
8 the application, so I certainly will be taking the  
9 position that I am entitled to come back and address  
10 those specific matters.

11 THE CHAIRMAN: You will have that right.

12 MR. CAMPBELL: Thank you.

13 THE CHAIRMAN: We will come back in 20  
14 minutes.

15 ---Recess taken at 10:08 a.m.

16 ---On resuming at 10:40 a.m.

17 THE CHAIRMAN: Mr. Campbell?

18 MR. CAMPBELL: Thank you, Mr. Chairman.

19 The first task that I have to do today is  
20 briefly on behalf of Mr. Hunter. I understand a letter  
21 dealing with this matter has been faxed to the Board  
22 and I have been asked to read that letter -- by Mr.  
23 Hunter to read that letter into the record and I  
24 propose to do so now with the Board's permission.

25 THE CHAIRMAN: Very well.

1                   MR. CAMPBELL: The letter is addressed to  
2       yourself Mr. Chairman re: The Undertaking, reads as  
3       follows:

4                   "In response to the Board's request for  
5       submissions on the nature of the  
6       undertaking, I provide the following  
7       written submissions. As I am unable to  
8       attend the hearing, I have asked Mr.  
9       Bruce Campbell to present these  
10      submissions to the Board in my absence.  
11      It is my understanding that, as confirmed  
12      by the Court of Appeal, the undertaking  
13      for which a proponent seeks approval is  
14      to be defined by the proponent. In this  
15      instance it appears from the description  
16      of the undertaking on page 1 of the  
17      summary form for the environmental  
18      assessment submission that the  
19      undertaking, timber management, consists  
20      of the sequence of the four activities of  
21      access, harvest, renewal and maintenance.  
22      The word 'planning' is not specifically  
23      mentioned in the description of those  
24      four activities. However, in our view,  
25      planning is integral to these activities.

1           The fact that the Ministry has chosen to  
2           present their undertaking in this manner,  
3           does not limit this Board's jurisdiction  
4           to deal with the planning of their  
5           management activities. The Board has the  
6           authority pursuant to Sections 12(2)(c)  
7           through (e) to accept the environmental  
8           assessment with or without amendment and  
9           also has the authority to approve the  
10          undertaking with or without terms and  
11          conditions. It is in the terms and  
12          conditions to the approval of the  
13          undertaking of the four activities that  
14          the Board has a wide latitude to deal  
15          with the planning procedure for those  
16          four activities. In so doing, the Board  
17          must give its fullest consideration to  
18          the impacts of the four activities on all  
19          of the people of Ontario and be mindful  
20          of those impacts in developing a planning  
21          procedure to address those impacts so as  
22          to protect, conserve and wisely  
23          manage Ontario's environment."

24               Now, as usual, Mr. Hunter has cut right  
25          through to the heart of the matter, and I will turn now



1 to my submissions.

2 It is our submission that this matter can  
3 be dealt with on a fairly straightforward basis. We  
4 generally support the position put forward by Mr.  
5 Freidin, except with respect to those questions which  
6 he says have no bearing on the thrust of his  
7 submissions in any event, and those questions were put  
8 by the Board and I will deal with them later in my  
9 remarks.

10 However, I want to emphasize that  
11 basically we believe that the submissions put forward  
12 by Mr. Freidin, to the extent that they are relevant to  
13 the way he has structured his case, are appropriate.

14 THE CHAIRMAN: What does than mean, Mr.  
15 Campbell, in terms of the fact that you support Mr.  
16 Freidin's position; does that mean that you could also  
17 support an alternative position?

18 MR. CAMPBELL: I think I will come to  
19 some of those specific questions that you put forward  
20 because it's really in that area, but I don't want to  
21 be too wishy-washy about this. I think Mr. Freidin has  
22 correctly stated -- or his analysis of the Act is quite  
23 correct in terms of the ability of the proponent to  
24 define the undertaking and the consequences that flow  
25 from that.

1                   Now, I want to start simply by saying I  
2           think it's important when we look back over the  
3           transcript of this hearing and the remarks that people  
4           may have made that bear on all of this that Mr. Freidin  
5           is quite correct, that there has been a certain amount  
6           of looseness of language and we are right now involved  
7           in an exercise in statutory interpretation where we  
8           have to be careful not to let that looseness of  
9           language creep in. As he says, MNR witnesses and  
10          probably MNR counsel, certainly Ms. Seaborn and myself  
11          and other counsel in this hearing have used the word  
12          'approval' in a wide sense that might have the  
13          appearance of relating to everything that is before the  
14          Board.

15                   I think it's fair to say that when we  
16          look at the Act, the Act uses the word 'approve' in a  
17          very specific way, and so if there is any conflict in  
18          some of the discussion that has gone on around some of  
19          these matters in the past, I think it's important to  
20          recognize that my submissions are going to be using the  
21          word 'approve' in its very specific usage within the  
22          statute.

23                   And where that leads me, just in terms of  
24          the structure of 12(2) - and I will come to this in  
25          perhaps a little more detail later on - is that what is

1 in front of the Board is more than an approval, and I  
2 think perhaps a convenient way to characterize it is  
3 that at the end of the day the Board is going to have  
4 to make an order or a decision and that order or  
5 decision relates to the three matters that are set out  
6 in Section 12(2)(c), (d) and (e).

7               There are three separate tasks  
8 enumerated. The first task relates to the acceptance  
9 or amendment and acceptance of the environmental  
10 assessment. The second task is the only task that  
11 relates to an approval, and it is whether an approval  
12 to proceed with the undertaking in respect of which the  
13 environmental assessment was submitted should or should  
14 not be given. And the third, and quite separate and  
15 distinct task, is to make a determination whether an  
16 approval as outlined in 12(2)(d) should be given  
17 subject to terms and conditions; and, if so, the  
18 provisions of such terms and conditions.

19               So that as we are embarking on an  
20 exercise in statutory interpretation, again, there are  
21 three tasks that are given to the Board, approval is  
22 only one of those tasks. I also want to point out that  
23 the approval that is contemplated isn't fair to simply  
24 stop reading at:

25               "...approval to proceed with the

1                   undertaking..."

2           and then say that the undertaking has some life of its  
3           own and can be changed. What the section says is, that  
4           it is:

5                   "...approval to proceed with the  
6                   undertaking in respect of which the  
7                   environmental assessment was submitted."

8                   It's not in respect to anything else,  
9           it's in respect to which the environmental assessment  
10          was submitted. That has a clear tie, it's a clear  
11          document and, in my submission, it is generally  
12          consistent with the philosophy that has been expressed  
13          by this Board in previous decisions and by the Court of  
14          Appeal in the stated case on Ontario Hydro's eastern  
15          Ontario transmission project.

16                   It seems to me that 12(2)(d) makes it  
17          quite clear and reinforces the notion in those  
18          decisions that the undertaking is what the proponent  
19          wants approval of or what it wants to do. And, quite  
20          simply, that is where this process starts.

21                   The proponent decides for its purposes  
22          that it wants approval of something or it wants to do  
23          something, and it takes a look at what it wants to do  
24          or what it wants approval of and then it takes a look  
25          at Section 1(o) and Section 3 which has parallel



1 language about defining an undertaking as an enterprise  
2 or activity or proposal, plan or program in respect of  
3 an enterprise or activity.

4 So the proponent says: Here's what I  
5 want to do, here's what I want approval of. Looking at  
6 that, do I have to go under the Environmental  
7 Assessment Act in order to do that. And they look at  
8 that definition and that wording, and if it falls  
9 within that framework - and that definition is no more  
10 than a framework - if it falls within that framework,  
11 the proponent says: Yep, got to go under the Act,  
12 prepares an environmental assessment to meet 5(3) and  
13 submits it to the Minister. In my submission, it is no  
14 more complicated than that.

15 Now, again, there has been lots of  
16 discussion in Board decisions about what the proponent  
17 is entitled to in terms of putting its application  
18 forward. And it seems to me that it makes good logical  
19 sense to say that the one thing that the proponent is  
20 entitled to, if nothing else - I won't get into  
21 everything else - but the one thing the proponent is  
22 entitled to is an answer to the question of: Can I do  
23 what I want to do. It's a simple proposition; they  
24 want to do something: Can I do it, yes or no?

25 The Board can decide for a myriad of

1 reasons to say no or yes. It's also given under a  
2 separate subsection 12(2)(e) the ability to say: Yes,  
3 but you have to do it my way and set out terms and  
4 conditions.

5 The eastern Ontario stated case  
6 reinforced this, the Divisional Court decision in  
7 answering, I think it was question 1 or 2 which the  
8 answer was confirmed on appeal, said that only the  
9 proponent describes the undertaking proposed.

10 The interim guidelines issued by the  
11 Ministry in 1981 stated the following, in plain terms:  
12 The undertaking is whatever the proponent is asking  
13 approval for as described in the EA Document. And that  
14 harkens back to the language in 12(2)(d) that it's the  
15 undertaking in respect of which the environmental  
16 assessment was submitted.

17 So simply put, we urge the Board to adopt  
18 the position, simply stated, that the proponent is  
19 entitled to a decision on what it wants approval to do.

20 Now, in granting that approval, if the  
21 Board chooses to grant it, the Board doesn't simply  
22 have to say: Go ahead and do it, the Board can say:  
23 You may do it if you do it this way, and then the  
24 proponent is put to an election, in effect, of saying:  
25 I will either proceed subject to those terms and

1 conditions, or I find them so onerous that I won't  
2 proceed.

3 And ignoring for a minute the ability to  
4 apply to Cabinet, but simply put, that is the position  
5 the proponent is in at the end of the hearing in terms  
6 of conditions that have been imposed.

7 Now, this business about whether the  
8 undertaking in circumstances such as this case must  
9 include a planning process is one on which I support  
10 Mr. Freidin directly on the proposition that there is  
11 nothing in the Act which says that a set of activities  
12 which is proposed to be carried out in the future must  
13 include in the definition of the undertaking a planning  
14 process in relation to those activities. In my  
15 submission, for the reasons that Mr. Freidin has given  
16 and for some others that I will come to, I believe, in  
17 my submission, that is the correct position to take.

18 You did, however, Mr. Chairman, ask Mr.  
19 Freidin, if my notes are correct: If the undertaking  
20 included a planning process, then would it be before  
21 the Board for approval? My notes indicate that Mr.  
22 Freidin answered that question: No, and basically on  
23 the proposition that a planning process could not  
24 properly be part of the undertaking.

25 I think our analysis parts company

1 somewhat on this question. I think it is possible to  
2 define, or it is possible for a proponent to come  
3 before the Board and say: I want approval of an  
4 undertaking which includes both activities and a  
5 planning process in relation to those activities. The  
6 point I take the Board back to, though, is that it is  
7 up to the proponent whether it wants to ask for its  
8 approval in that way and the proponent bears the  
9 consequence of that decision.

10 I don't think this point affects Mr.  
11 Freidin's submissions on the matters that he's  
12 concerned about directly, simply to try and round out  
13 this interpretation of the Act which is of a concern to  
14 the Ministry I represent, I wanted to make it clear  
15 that we take a somewhat different view on that narrow  
16 issue.

17 Now, I think it's very interesting to  
18 note - I will also say in passing - that there are two  
19 cases that have been decided by Joint Boards, two  
20 related cases, the Ontario Hydro eastern Ontario and  
21 southwestern Ontario plan stage decision. The  
22 southwestern Ontario plan stage decision was quashed.  
23 As you are aware, Mr. Chairman, the same reasoning  
24 however on this issue was applied in the parallel  
25 application in eastern Ontario and that decision



1 survives unscathed, but in that case, the Joint Board  
2 was considering an application which contemplated  
3 approval of a broad plan approach before the work was  
4 done to take that program down to actual impacts on  
5 specific piece of geography; the first layer of  
6 approval, if you will, was a broad -- what was called a  
7 plan stage approach.

8                   And included in the program which was  
9 originally put forward for approval was the set of  
10 activities which would be carried out in order to get  
11 down to a decision as to where to put that facility on  
12 the ground. In that case an intervenor group, the  
13 Hydro Consumers' Association represented by Mr.  
14 Schreyban argued that that planning process - although  
15 I don't think that terminology was quite used, but that  
16 set of activities, that's in fact what it was, was a  
17 planning process - that it would not be proper for the  
18 Board to approve that.

19                   The Board made it pretty clear that it  
20 wasn't interested in approving it and, as a result,  
21 imposed a term and condition -- when they granted the  
22 approval at the plan stage, imposed a term and  
23 condition which denied specific approval of the general  
24 outline of activities which were to be carried out in  
25 bringing that project down to a specific piece of

1 geography.

2                   Unfortunately I don't have any of the  
3 reasoning or argument with me today on that, I just  
4 have the statement in the decision. The matter was  
5 settled really by way of motion in the course of the  
6 proceedings and I think the critical point to note it  
7 was that the resolution of the matter that is reflected  
8 in the judgment -- or in the order was consented to by  
9 the proponent, and I think this is consistent with the  
10 general rulings again that have been held with the  
11 undertaking; it's not that the undertaking is  
12 permanently fixed for all time, it is that if it's  
13 going to change it can only be done with the consent of  
14 the proponent because the proponent is, after all,  
15 entitled to get an answer to the question he needs  
16 answered.

17                   It's pretty unusual for that kind of  
18 amendment to be made on consent of the proponent, but  
19 that is the proper mechanism and, for the reasons that  
20 I have outlined, it's our submission that without such  
21 consent the Board has no jurisdiction to redefine the  
22 undertaking.

23                   Now, having taken that little diversion  
24 down to another area of the province, the whole purpose  
25 of that was simply to point out that there needs to be

1       preserved considerable flexibility in terms of how the  
2       undertaking is approached. It would be entirely  
3       inappropriate, in my submission, to lay down a series  
4       of rules as to: An undertaking of this type must  
5       include as part of the undertaking "x" "y" and "z"; an  
6       undertaking of another type must include some other set  
7       of provisions.

8                       And the reason I say that is simply  
9       because of the submission that I have made that the  
10      undertaking is the statement by the proponent of what  
11      it wishes to do and it is entitled to get an answer  
12      whether it can do that.

13                     I think that philosophy or that concept,  
14      that analysis is also supported by the reasoning of the  
15      Court of Appeal level decision in the eastern Ontario  
16      stated case where the Court of Appeal made it quite  
17      clear that a plan, program or proposal could clearly be  
18      stated to be as broad as something that related to  
19      activities which might take place over the whole of the  
20      Province of Ontario, and that is very close to the  
21      situation that we are in today.

22                     Now --

23                     MRS. KOVEN: Excuse me, Mr. Campbell, on  
24      that point, the last point you were talking about.  
25      What happens in the situation where there is a series

1 of decisions by the Environmental Assessment Board  
2 where it's very clear that the Board wants something to  
3 be included in the undertaking.

4 Let's say you are looking at a landfill  
5 site and every Board decision for years says we want a  
6 social impact assessment and they just consistently  
7 make that a condition of approval, and at some point I  
8 guess a proponent who is receiving advice about how to  
9 do an EA will adopt that as part of its undertaking.

10 MR. CAMPBELL: Well, if what we are  
11 talking about is the preparation of the environmental  
12 assessment analysis itself, the Board through -- it's  
13 like any body of practice, the Board will indicate over  
14 time what it sees as acceptable and unacceptable and  
15 that if the Board is requiring a certain kind of  
16 analysis as part of an environmental assessment and  
17 that analysis is not forthcoming and is felt to be  
18 required under the legislation, then the Board does its  
19 first job, it looks at: Do we accept the environmental  
20 assessment, and it says: Because we think it doesn't  
21 meet the legislation, we are not prepared to accept  
22 that environmental assessment as the basis upon which  
23 to make a decision on our other two matters.

24 It never gets to the other two matters,  
25 it never gets to the question of approval because it



1        says: Look, you the proponent are responsible for  
2        putting forward enough information for us to meet that  
3        analysis requirement under the Act and you haven't done  
4        so, the environmental assessment is unacceptable for  
5        purposes of making a decision, application denied.

6                        Now, I want to turn to another question  
7        that you asked of Mr. Freidin which was: Can the Board  
8        refuse an approval if it's not satisfied with the  
9        planning process.

10                      Taking that simple question, it is our  
11        submission that the answer is yes. I think this is one  
12        that Mr. Freidin answered no. The reason we will say  
13        the answer is yes is that if the Board is persuaded  
14        that without imposing an adequate planning process the  
15        Board could not satisfy itself that environmental  
16        protection would be achieved in carrying out the  
17        activities then, in my submission, it would be open to  
18        the Board under those circumstances to deny the  
19        application; not because of any deficiency in the  
20        undertaking as stated, but because the Board was not  
21        satisfied that in carrying out the undertaking that  
22        environmental protection could be perceived. It's a  
23        standard of proof question that leads me to a different  
24        answer than I think Mr. Freidin gave.

25                      THE CHAIRMAN: Could it also be, Mr.

1 Campbell, that if the planning process was part of the  
2 undertaking in relation to specific activities, that  
3 the Board could refuse under 12(2)(d) approval to  
4 proceed with the undertaking in respect of which the  
5 environmental assessment was submitted?

6 MR. CAMPBELL: Yes. If the proponent had  
7 included in what it wanted to have approved the  
8 planning process, then the answer to the question is  
9 yes. I, of course, remind the Board that that is not  
10 the way it has been done in this case, that that is not  
11 part of the approval requested in the technical meaning  
12 that we are dealing with today, but I do say that the  
13 proponent has a choice on whether to include it.

14 Before I deal with some of the other  
15 questions that arose, I want to turn to the  
16 consequences of that choice and what it means for this  
17 hearing. In the end it is our submission that the  
18 Board has got to make its rulings applicable to this  
19 hearing, and while it can apply general principles, in  
20 the end it has got to deal with the application that is  
21 in front of it.

22 And it is our submission that not only  
23 does the proponent in this case, MNR, have the right to  
24 say what it's seeking approval of, but in this case, by  
25 doing it the way MNR has done it, the proponent has

1 simplified and facilitated this panel's ability to deal  
2 with the issue of the planning process. I think, in  
3 fact it is our submission that doing it in the way that  
4 it has been done in this application is better from a  
5 planning viewpoint than including that planning process  
6 in the undertaking.

7 Let me tell you why. If the planning  
8 process is part of the undertaking, then the Board is  
9 taken into the question of approval under 12(2)(d).  
10 The Court of Appeal in the eastern Ontario stated case  
11 has ruled unequivocally that the Board has the  
12 authority to approve alternative methods of carrying  
13 out the undertaking, but the Board has no jurisdiction  
14 to approve alternatives to the undertaking.

15 All it can do, if it is satisfied that an  
16 alternative to is better, is deny the application.  
17 It's a pretty Draconian remedy. If they are satisfied  
18 that their 'alternative to' is substantially better,  
19 would be much better, they can't say: Okay, do it but  
20 do it according to the 'alternative to'; all you can do  
21 is deny the application, even though you know the  
22 better way to do it.

23 Instead, in this case, what the proponent  
24 has done is say: Here is what we want to do and we  
25 have set out in effect in our proposed terms and

1 conditions a planning process which will determine how  
2 we make the decisions as to how we carry out those  
3 activities. By doing it that way, the planning process  
4 comes before the Board as part of the third task that  
5 the Board has been asked to deal with; and, that is,  
6 whether the approval mentioned in clause (d) should be  
7 given subject to terms and conditions and, if so, the  
8 provisions of such terms and conditions.

9 The Board has a wide latitude to impose  
10 terms and conditions as to how the decisions in  
11 relation to those activities shall be made.

12 The Board in dealing with the matter  
13 under 12(2)(e) doesn't have to go through the exercise  
14 of looking at a different approach, deciding whether it  
15 is properly characterized as an alternative method or  
16 an 'alternative to' and dealing with it differently  
17 depending on the outcome of that characterization.  
18 That whole difficult analysis is simply jettisoned, it  
19 is avoided by the way in which the proponent has set  
20 out its undertaking in this application.

21 And it is our submission that in fact by  
22 avoiding that whole difficult analysis, the Board's  
23 task in dealing with planning issues in this  
24 application is considerably simplified. Mr. Freidin  
25 has stated on the record unequivocally that it is the



1       proponent's view that the Board has a wide discretion  
2       to impose variations on the planning process that has  
3       been put forward by the proponent, or impose a whole  
4       new planning process if you saw fit to do so.

5                       And it is our submission in the  
6       circumstances of the application before you that not  
7       only is it the right of the proponent to do so, to  
8       define the undertaking the way it wishes, but that in  
9       fact the proponent has made your job and the job of all  
10      of the participants in this hearing considerably easier  
11      by defining it just the way they have defined it.

12                     You have got no restrictions on what you  
13      can do with respect to the planning process in any real  
14      way. As Mr. Freidin said, you can't go wild on the  
15      matter, but any set of reasonable planning proposals  
16      are within your jurisdiction to adopt.

17                     And, in our submission, that is a  
18      preferable way to deal with the planning matter in an  
19      application of this type. Be it called a Class EA or  
20      any other kind of EA, in an application of this type,  
21      that's the preferable way to do it, because it gives  
22      the Board a latitude that is not associated with this  
23      analysis of alternative methods and characterization of  
24      alternative methods and alternatives to.

25                     In our submission, it facilitates the

1 achievement of the purposes of the legislation and  
2 considerably simplifies the job of all of us in this  
3 hearing who are concerned about the planning process.

4 And so, of course, having said all of  
5 that, it brings me to the question you asked Mr.  
6 Freidin having to do with whether the powers were any  
7 different if the planning was part of a term and  
8 condition or whether it was part of an undertaking.

9 In my submission, your powers are  
10 different; in many respects they are more restricted if  
11 the planning process is included in the undertaking  
12 because you have to go through this question of  
13 characterization as an alternative method or an  
14 'alternative to'. In my submission, that is a  
15 difference in the powers depending on whether the  
16 planning process falls into terms and conditions or  
17 undertaking.

18 Now, Mr. Chairman, the other question  
19 that has clearly troubled the Board in the course of  
20 this whole discussion of alternatives has been what do  
21 the words plan, program or proposal mean in the context  
22 of the definition of the undertaking and as used in  
23 Section 3. I urge upon you in looking at that question  
24 that you really must come at it from the perspective of  
25 a proponent who is seeking to do something, and all of

1       those words included in Section 1(o), repeated in  
2       Section 3, are designed to set out the framework which  
3       tells the proponent whether what he wants to do comes  
4       under the Act: Here is what I want to do, is it caught  
5       by those words, does it fall within that box of those  
6       words. If it does, I go under the Act; if it doesn't,  
7       I don't go under the Act. And that's all those words  
8       are intended to do.

9                       Conceptually that's not very complicated  
10       but the words plan, program or proposal are put forward  
11       to recognize the fact that an undertaking - and I am  
12       reading here frequently from page 15 of the Interim  
13       Guidelines on Preparation of Environmental Assessments  
14       which are dated January, 1981. Page 15 of those  
15       guidelines, what it says is that:

16                      "An undertaking may be in the form of a  
17                      physical project such as a road or  
18                      electric generating station, or be more  
19                      abstract such as a plan, program or  
20                      activity."

21                      THE CHAIRMAN: In respect of an  
22       enterprise or activity?

23                      MR. CAMPBELL: Yes. I think in fact what  
24       the direct quote from the document says, more abstract:  
25       "...such as a plan, program or activity", I think in

1 fact it should say: "...a plan, program or proposal",  
2 and of course in the Act the words carry on to say:  
3 "...in respect of an activity."

4 Obviously the only -- a plan, program or  
5 proposal by its very nature is an abstract thing and  
6 must be in relation to something and, therefore, the  
7 definition goes on and says if you are putting forward  
8 a plan, proposal or program you have got to say in  
9 respect of what activity it is in relation to. That's  
10 part of what brings you within the framework.

11 In my submission it is not a difficult  
12 concept, it just recognizes the reality that  
13 permissions to do things may well be in relation to  
14 both future endeavors or collections of inter-related  
15 activities and when building the framework within which  
16 activities would be subject to the Act, the drafters of  
17 the legislation wanted to be sure that they caught  
18 matters at a sufficiently early stage that you couldn't  
19 just apply the legislation to actual hard facilities  
20 that you wanted to start construction of immediately.

21 The language that's generally used in  
22 relation to the legislation often talks about, it  
23 encourages good planning, it encourages bringing  
24 environmental considerations to bear at the earliest  
25 possible date, and in order to accommodate the ability



1 to do it under the Act, the language, 'plan, program,  
2 proposal in relation to activities' was put in to allow  
3 people to come forward and to catch people and make  
4 them come forward at an appropriate stage, before  
5 decisions are irrevocably made, all of those kinds of  
6 arguments that are made to encourage environmental  
7 protection. And, in our submission, it isn't really  
8 any more complicated than that.

9 I think an example I could give you of  
10 that kind of approach is all of the waste management  
11 master planning that's going on in the province now.  
12 The approach that's been taken in that master planning  
13 is not that each and every element, each and every  
14 physical facility will be approved in all of its  
15 details at the master plan approval level, it is a  
16 proposal, plan or program in respect of an activity,  
17 and it encourages a broad and coordinated look or a  
18 broad and coordinated framework within which individual  
19 activities will then be brought forward to be dealt  
20 with in their specificity. And that surely is  
21 something that the Environmental Assessment Act should  
22 encourage not discourage.

23 THE CHAIRMAN: Are any of the waste  
24 management plans in your understanding, Mr. Campbell,  
25 portrayed as a form of Class EA with provision within

1       them for bump-up in terms of specific approval for  
2       specific facilities such as a landfill or EFW which may  
3       be encompassed within the waste management plan itself?

4               MR. CAMPBELL: I don't think I can  
5       honestly give you details on that, Mr. Chairman, I am  
6       just not familiar enough with it in specific enough  
7       detail.

8               I know the general approach being taken  
9       is to encourage a long-term view to encourage a broad  
10      proposal, but in fairness I don't think I know enough  
11      about it in detail to venture an answer to your  
12      question.

13              I would also submit that in putting  
14      together this framework which is captured in the  
15      definition Section 1(o) of the Act, the reason this  
16      wide wording was used is simply so that when a  
17      proponent asks the question: I want to do something, I  
18      want to put forward a program or a proposal, or  
19      whatever it is I want to put forward, when it asks that  
20      question the proponent has to take a broad view of the  
21      application of the Act.

22              It can't rustle around in the wording of  
23      1(o) and come up with an interpretation that is so  
24      narrow that it can properly say: Even though what I  
25      propose to do may well have significant consequences, I

1 can squeeze by the Act. Clearly in putting it forward  
2 this way it was intended to encourage this early look  
3 at the kind of considerations that are set out in the  
4 Environmental Assessment Act and encourage the good  
5 planning that is the objective of the legislation.

6 Now, for all of those reasons it is our  
7 submission that although everyone has had a little  
8 trouble with the vernacular usage of the words -- or in  
9 the vernacular with the proposition that the planning  
10 process isn't "up for approval", when you look at it  
11 rigorously, applying the words of the statute, the  
12 reasons for that statement are quite clear, they are in  
13 our submission correct, that approach responds well to  
14 the purposes and objectives of the legislation, that  
15 approach furthers the intent of the legislation, it  
16 makes it easier for both the intervenors and the Board  
17 to deal with the planning process and, in our  
18 submission, that is the interpretation that the Board  
19 should adopt.

20 Unless the Board has any other questions,  
21 and subject to matters which I know Mr. Lindgren is  
22 going to raise and other matters which Mr. Cassidy may  
23 raise in order to surprise us all, those are my  
24 submissions.

25 THE CHAIRMAN: Okay. Mr. Freidin, let's

1 go back with a couple of questions relating to the  
2 other issue which was the thing that gave rise to this  
3 whole discussion in the first place, and that was the  
4 consideration of licensing.

5 If in fact the definition as proposed by  
6 MNR of 'undertaking' does not include the planning  
7 process in relation -- or in respect of the four named  
8 activities, does that, in your view, make any  
9 difference with respect to whether or not the treatment  
10 of licensing in general as a regime as opposed to  
11 specific licences can or can't be considered in  
12 evaluating the planning process?

13 And with that we of course would have to  
14 refer to Section 9 and Section 10 of the applicable  
15 regulation, 205-87.

16 MR. CAMPBELL: I don't think any of the  
17 submissions I have made today change anything that has  
18 been said on that issue.

19 THE CHAIRMAN: Well, there have been more  
20 than one position taken on that issue between your  
21 client, for instance, and the Ministry of Natural  
22 Resources.

23 MR. CAMPBELL: Yes, and --

24 THE CHAIRMAN: You are still I think of  
25 the opinion that Ms. Seaborn put forward; and, that is,



1       that Section 9 deals only with the activity of granting  
2       licences after an approval, as opposed to a  
3       consideration of licensing being exempted from the  
4       provisions of Section 5(1) and, accordingly, the Act?

5               MR. CAMPBELL: Yes. Nothing I have said  
6       today should detract in any way from the position put  
7       forward by Ms. Seaborn on that issue.

8               We do take the position that Section 9  
9       that you have outlined, that position is the position  
10      taken by the Ministry of the Environment, it is the  
11      position that, in our submission, is the plain reading  
12      of the EA Update which discusses that section of the  
13      regulation, and it is the one we urge upon this Board.  
14      And we do not think that taking that position or  
15      anything that I have said today detracts in any way  
16      from that position.

17              In point of fact, we just don't -- I  
18      would put it perhaps even more strongly than that:  
19      There is no direct connection between the issue that we  
20      have dealt with today and that specific question that  
21      you have put to me.

22              THE CHAIRMAN: Are you going to take that  
23      position or adopt the position that I guess was first  
24      put forward by Ms. Seaborn, Mr. Campbell, with respect  
25      to what the wording of Section 10 of the regulation

1 means as it relates to the word 'undertaking' as it is  
2 used on three different occasions in that section?

3 MR. CAMPBELL: I am advised by Ms.  
4 Seaborn that she has no recollection of making any  
5 submission specifically on Section 10 of the  
6 regulation, and I am going to have to get it in front  
7 of me before I properly answer your question.

8 THE CHAIRMAN: Well, I think the Board  
9 would also like your opinion on that section.

10 MR. CAMPBELL: I'm sorry, Mr. Chairman, I  
11 think a simple answer to any concern about Section 10  
12 is that it relates to the regulation in general, it is  
13 not purported to be there to apply simply to Section 9  
14 above it. It speaks to:

15 "Notwithstanding any provisions of this  
16 regulation exempting any undertaking from  
17 the provisions of the Act..." and  
18 continues.

19 That section is a much more general  
20 application than simply to be an expansion on 9. We  
21 take the position, as I have said, on 9 that it is  
22 intended to be very narrow, and simply to make it  
23 clear, that when a relevant minister sits down to grant  
24 a licence, permit, approval under the wide range of  
25 legislation that ministers have to conduct those

1 activities - I mean, there is a lot of permits the  
2 ministers have to give out covering a myriad of  
3 matters - and Section 9 says that when they actually  
4 sit down to sign the permit, that activity is not  
5 contemplated as an undertaking under the Act.

6 It is no more difficult than that, in our  
7 view and that's set out in the discussion in the EA  
8 Update that's been filed with the Board. It indicates  
9 that these permits, approvals, et cetera, are not in  
10 themselves undertakings which require environmental  
11 assessment. The general intention being not to  
12 regulate these activities of granting permits, but  
13 rather to apply the Act to the undertakings which they  
14 facilitate, if such undertakings are environmentally  
15 significant. And, in our submission, those words are  
16 clear as a bell.

17 I'm tempted to make the kind of  
18 submission that Bob Macaulay used to make which says:  
19 Well, I should know what it means because I wrote it.  
20 I didn't write it, but I am appearing for the Ministry  
21 that did, and that's the intention of the section.

22 I have never been persuaded that Mr.  
23 Macaulay's submissions in this respect ought to be seen  
24 as persuasive, but he had a pretty good track record,  
25 so I will just follow on his example.

1                   THE CHAIRMAN: So to clarify the Ministry  
2 of the Environment's position, regardless of how the  
3 undertaking is defined, the licensing regime by the  
4 Ministry of Natural Resources as part of its planning  
5 process as a method of carrying out the activities of  
6 access, harvest, renewal and maintenance is a proper  
7 matter for consideration by this Board?

8                   And I arrive at that conclusion if the  
9 Board adopts your position that only the activity of  
10 granting licences or permits, presumably in specific  
11 cases, were not meant to be covered by the  
12 Environmental Assessment Act; that is, an environmental  
13 assessment was not intended every time a minister or  
14 other official wishes to grant a licence or permit, but  
15 that is a different situation than examining a  
16 licensing regime as a method of regulating or carrying  
17 out the activities defined by the proponent in its  
18 undertaking?

19                  MR. CAMPBELL: I think, Mr. Chairman, you  
20 have probably overstated our position and on the  
21 specific question that you asked originally, I would  
22 have to say, no, I think our point is that the Board's  
23 determination on that matter of licensing is not  
24 dependent on - whichever determination it feels is the  
25 right one on the licensing motion - reports of whether



1 the planning process is dealt with properly through  
2 terms and conditions, as we have suggested, that making  
3 that ruling does not limit your ability or determine  
4 the question of licensing before you.

5 THE CHAIRMAN: Okay, but I am going  
6 beyond the previous arguments of today.

7 MR. CAMPBELL: I rather had that sense.

8 THE CHAIRMAN: Assuming that the Board  
9 adopts your position, that of your client and the  
10 Ministry with respect to the definition of the  
11 undertaking, does the exemption purported to be  
12 contained in Section 9 as modified or unmodified by  
13 Section 10, permit the Board to look at the overall  
14 issue of licensing as it is used by the Ministry as a  
15 method of regulating the carrying out of the  
16 activities?

17 And to that we might add perhaps two  
18 exceptions, Mr. Campbell, and that is, without dealing  
19 specifically with the question of existing licences  
20 that are already out there signed and in force. We are  
21 talking about the planning process which incorporates  
22 as part of it a licensing regime which may or may not  
23 be specified in terms of how you go about it by  
24 provisions of other statutes such as the Crown Timber  
25 Act, et cetera.

1                   MR. CAMPBELL: Well, Mr. Chairman, first  
2 I think your use of the word 'method' -- I have been  
3 very careful about language today and that sort of  
4 contemplates that process being part of the undertaking  
5 and I don't want to give up my point on that by  
6 answering your question as specifically --

7                   THE CHAIRMAN: Well, I'm trying to be  
8 careful with the wording as well to try to characterize  
9 how the Ministry uses, if we might utilize the phrase  
10 for lack of a better one, the licensing regime as a  
11 manner of regulating the carrying out of the  
12 activities, because there are impacts which obviously  
13 result from the way the licensing is undertaken,  
14 particularly in terms of FMA type agreements and the  
15 impacts that result from those FMA agreements to the  
16 environment in its broadest sense, social and economic,  
17 et cetera, are, the Board would think, part of the  
18 subject matter of this application before us.

19                  MR. CAMPBELL: I think that's correct,  
20 Mr. Chairman, in the sense that if in applying a  
21 planning process to making decisions as to how the  
22 activities are to be carried out there is in an area  
23 potential for environmental effect or an overall  
24 difference in advantages and disadvantages, whether one  
25 goes this way or that way, then that is squarely before

1 the Board, but it seems to me that in some way this  
2 whole question has become more complicated than it  
3 needs to be.

4 We say the Minister can sign those  
5 licences and when he signs them that is not an  
6 undertaking. We also say that the proponent has stated  
7 that those licences won't be signed except in  
8 accordance with the plans that have been approved under  
9 the timber management planning process, and as near as  
10 I can see, and in our submission, that is the end of  
11 the question.

12 THE CHAIRMAN: So are you then taking the  
13 position, Mr. Campbell, that parties in opposition or  
14 any party can properly cross-examine witnesses or  
15 adduce evidence of their own on the licensing regime  
16 that is employed, not specifically dealing with perhaps  
17 existing licences that are already in effect, but when  
18 it comes down to, in the future, the Ministry setting  
19 in place further licensing regimes in terms of say  
20 future FMA agreements as an example, because this is a  
21 way of regulating the carrying out of the activities  
22 which may have certain environmental impacts both  
23 positive and negative, the Board could in terms and  
24 conditions put forward its views as to how those  
25 licensing mechanisms should be employed, and couch its

1 approval of the undertaking subject to terms and  
2 conditions in terms of the planning process to  
3 facilitate its view of how the licensing regime should  
4 be employed?

5 MR. CAMPBELL: Mr. Chairman, I think my  
6 difficulty in dealing with that question is that I'm  
7 not sufficiently confident that I understand the  
8 difference between the licensing regime and the  
9 planning process to answer your question intelligently.

10 What I do say is that to the extent that,  
11 whatever it is, the licensing regime is part of the  
12 planning process, then the submissions we have made  
13 today stand.

14 THE CHAIRMAN: Well, let me try and  
15 clarify it for you. It has been put before the Board  
16 that there is such a regime out there that embodies  
17 FMAs and these agreements have, for example, specific  
18 terms, may comprise and do comprise specific land bases  
19 depending on who the participants are, who they are  
20 granted to, who the licensees are, have provisions for  
21 renewal upon review--

22 MR. CAMPBELL: At certain time limits.

23 THE CHAIRMAN: --at the end of a  
24 five-year period, and then you add, if there is no  
25 default, a further five years to the term, so almost in



1       perpetuity the licences, if there are no defaults -- or  
2       the FMA agreements, if there is no default, continue on  
3       indefinitely, et cetera.

4                       Now, should the Board after hearing  
5       contrary views or other views of other parties through  
6       their own cases or through cross-examination, reach the  
7       conclusion that it is inappropriate, for instance, that  
8       the term of an FMA should be 20 years, or that it is  
9       inappropriate that the land base included within an FMA  
10      should be different, for example, than a land base  
11      which coincides with other types of management units  
12      such as the forest management unit as defined now by  
13      the Ministry.

14                      If the Board came to any of those  
15      conclusions could it, in your view, as a term and  
16      condition - assuming for the purposes of this  
17      discussion that the undertaking is not defined to  
18      include the planning process - can the Board, as a  
19      condition of approval, deal with those types of issues,  
20      bearing in mind that there are existing agreements out  
21      there in force which are valid contracts entered into  
22      by parties subject to other legislation such as the  
23      Crown Timber Act and the ability of the Board to  
24      interfere with those existing agreements might be  
25      restricted?

1                   That is the difference that we are trying  
2           to bring forward in terms of dealing with specific  
3           licences and dealing with the way licensing is used as  
4           a form of regulating the carrying out of the  
5           activities. That is the difference, if I think that  
6           helps.

7                   MR. CAMPBELL: All right. It helps and  
8           I'm going to ask for the lunch break because I clearly  
9           should discuss this matter with both Ms. Seaborn and  
10          Mr. Sutterfield.

11                  THE CHAIRMAN: Okay. And you realize how  
12          this came about, initially, through Mr. Colborne's  
13          original submissions as to what he wanted to  
14          cross-examine Panel 17 on.

15                  MR. CAMPBELL: And Mr. Freidin's motion.

16                  THE CHAIRMAN: And Mr. Freidin's reply  
17          and motion as to what the Board can validly examine,  
18          and what is within the jurisdiction of the Board to  
19          comment upon in its decision.

20                  MR. CAMPBELL: Yes.

21                  THE CHAIRMAN: These are the areas that,  
22          again - apart from the question of what is the  
23          definition of the undertaking - we would also like to  
24          clarify as part of this motion.

25                  MR. CAMPBELL: Yes, I understand.

1 THE CHAIRMAN: Okay.

2 Mr. Cassidy, I assume that you will want  
3 to hear Mr. Campbell's reply before you have anything  
4 to say; is that correct?

5 MR. CASSIDY: That's correct.

6 THE CHAIRMAN: Same with you, Mr.  
7 Lindgren?

8 MR. LINDGREN: That's correct.

9 THE CHAIRMAN: And, Mr. Colborne?

10 MR. COLBORNE: Yes.

11 THE CHAIRMAN: Okay. 1:30.

12 MR. CAMPBELL: Thank you.

13 THE CHAIRMAN: Thank you.

14 ---Luncheon recess taken at 11:45 a.m.

15 ---On resuming at 1:45 p.m.

16 THE CHAIRMAN: Thank you. Be seated,  
17 please.

18 Ladies and gentlemen, just before we  
19 proceed, the Board wants to advise all parties on the  
20 record that any party who has not filed a statement of  
21 issue with respect to the Panel 1 of the Industry's  
22 case to this point in time will require leave from the  
23 Board before they will be allowed to cross-examine on  
24 that panel.

25 We have set deadlines, we have extended

1 the deadlines in the past, we have been quite lenient  
2 in terms of the time lines that have been established  
3 for an orderly progression of this hearing, and the  
4 Board has reached the stage where parties will have to  
5 show a very cogent reason why they should be granted  
6 leave to cross-examine on a panel where they have not  
7 filed the statements of issue within the prescribed  
8 time limits.

9 To date we are advised by the hearing  
10 liaison officer that only three statements of issue  
11 have been received from three parties. In the past, as  
12 you are aware, there were more than three parties  
13 involved on day-to-day basis in this hearing, and we  
14 can only presume that they are waiving their rights to  
15 cross-examine.

16 MR. CASSIDY: Mr. Chairman, I might be  
17 able to assist in that regard. I received  
18 communications from both Mr. Edwards on behalf of NOTOA  
19 and Mr. Hanna on behalf of Anglers & Hunters that they  
20 have not filed statements of issues and do not intend  
21 to cross-examine the OFIA/OLMA Panel 1 witnesses.

22 THE CHAIRMAN: All right. Well, that may  
23 account for those two parties.

24 MR. CASSIDY: I have not heard from any  
25 others.



1 THE CHAIRMAN: But this direction goes to  
2 any other party as well. So any party who has not  
3 filed as of now requires leave from the Board before  
4 they will be allowed to cross-examine on Panel 1.

5 Okay, Mr. Campbell.

6 MR. CAMPBELL: Mr. Chairman, we have  
7 given some thought to the question you raised with us  
8 before the lunch break.

9 I guess there are a number of points that  
10 I wish to make in relation to licences and we take the  
11 position that this is a question that is distinct from  
12 the question of whether the planning process is  
13 included in the undertaking. Just to be clear, that we  
14 are not attempting to make a connection to submissions  
15 on that earlier matter.

16 However, first, we would like to say  
17 that, and we submit to you, that it is clear in reading  
18 the proponent's environmental assessment that licences  
19 are granted only on terms that are consistent with  
20 approved timber management plans.

21 Second, those approved plans are the  
22 result of the application of a planning process over  
23 which the Board has control by way of terms and  
24 conditions.

25 Third, the question of whether any term

1       and condition is appropriate is dependent on  
2       establishing in evidence that there is a cause and  
3       effect relationship between the way in which timber  
4       management is carried out and the environmental effect  
5       of concern to the party.

6                       Obviously in dealing with environmental  
7       effect I'm using the word 'environment' with the full  
8       breadth of its definition in the Act.

9                       THE CHAIRMAN:   Sorry, would you repeat  
10       the last part of that please, Mr. Campbell?

11                      MR. CAMPBELL:   Yes.   My third point was  
12       that the question of whether any term and condition is  
13       appropriate is dependent on establishing any evidence  
14       that there is a cause and effect relationship between  
15       the way in which timber management is carried out and  
16       the environmental effect of concern to the party.

17                      Having established that cause and effect  
18       relationship, the test of whether the term and  
19       condition should be adopted is one of whether the  
20       proposed term and condition is a reasonable manner of  
21       addressing that effect.

22                      And, in our submission, if those analytic  
23       steps are taken in dealing with any proposal, either to  
24       call evidence or in relation to a term and condition,  
25       you are applying tests that are the appropriate tests

1 under the Environmental Assessment Act and the question  
2 should be answered in that context and not by  
3 answering -- or not by posing any different question as  
4 to whether it fits into some other regime or some other  
5 scheme. And those are the questions that are relevant  
6 questions for the job that you have been asked to do.

7 Now, you gave me a specific example that  
8 I would like to address and I think --

9 THE CHAIRMAN: Just before you get to  
10 that. Does that allow, therefore, parties in  
11 cross-examination to raise what they believe to be  
12 questions relating to the cause and effect and their  
13 concern with respect to the environmental impact of  
14 that cause and effect and, in their own case, to raise  
15 and adduce evidence as to how that cause and effect and  
16 environmental impact might be reasonably addressed  
17 through a term and condition?

18 MR. CAMPBELL: Yes to both questions.

19 THE CHAIRMAN: Thank you.

20 MR. CAMPBELL: I want to deal with one of  
21 the specific examples you put to me this morning, where  
22 we would take the position, for instance, that if the  
23 Board had evidence called in front of it that although  
24 the planning process was excellent in all other  
25 respects it only worked effectively if a forest

1 management agreement area was twice as big as the  
2 existing average size - let's just take a very  
3 simplified example - if it was twice as big in  
4 geographic area, if there was evidence in front of you  
5 that persuaded you of that point of view, it would be  
6 open to you to impose a term and condition that would  
7 result over time in that process being applied on that  
8 larger area, or that larger unit size; and, presumably,  
9 a term and condition appropriately worded would be  
10 appropriate to achieve that result.

11 But the point we are trying to make in  
12 dealing with this is that these matters are evidentiary  
13 in nature, they cannot be dealt with in terms of what I  
14 might call pure legal questions that are in some way  
15 strictly statutory interpretation, that's as lawyers  
16 sometimes want to do, disconnected from the particular  
17 case in front of you.

18 We say that it is not wise and we urge on  
19 the Board the position that it is not wise to deal with  
20 these questions which are evidentiary in nature until  
21 you actually see the terms and conditions that are  
22 proposed and actually deal with the evidence that is  
23 proposed to support those terms and conditions. To try  
24 and deal with it in some global basis apart from the  
25 specifics that you are being asked to deal with would,



1 in our submission, be a mistake.

2 And, as I say, we submit to you that if  
3 those principles are followed, that is an appropriate  
4 way under the Act to deal with the licensing question,  
5 if I can call it that, and I think that those  
6 principles are entirely consistent with the submissions  
7 that Ms. Seaborn made to you last week as well.

8 THE CHAIRMAN: And, therefore, following  
9 what she said last week, you would oppose an order of  
10 this Board in the terms requested by the Ministry of  
11 Natural Resources, for instance under paragraph 2 of  
12 the Notice of Motion?

13 MR. CAMPBELL: Yes, I think that is  
14 correct. That's correct.

15 THE CHAIRMAN: All right.

16 MR. CAMPBELL: Thank you, Mr. Chairman.

17 THE CHAIRMAN: Thank you.

18 Mr. Cassidy, are you next up?

19 MR. CASSIDY: This may look like I'm  
20 settling in for a long period, I can assure you I'm  
21 not.

22 Mr. Chairman, I want to discuss my  
23 remarks in two contexts: One, in dealing with the  
24 issue of the definition of the undertaking; and the  
25 second context, dealing with essentially responding to

1        what Mr. Campbell has just said and then I will sit  
2        down.

3                        First of all, with respect to the matter  
4        of the issue of the definition of the undertaking, I  
5        heard Mr. Freidin state today that the undertaking does  
6        not include the planning process and that the  
7        definition of the undertaking stated in the  
8        Environmental Assessment Document, which is Exhibit 4,  
9        does not include the planning process. And having  
10      reviewed that for yet another time, it's clear to me  
11      that it does not state that in there.

12                      Mr. Chairman, if you accept the  
13      submission that the definition of undertaking contained  
14      in Section 1(o) of the Act is disjunctive in nature,  
15      it's my submission that it was and is entirely  
16      appropriate for the Ministry of Natural Resources to  
17      have defined the undertaking as it has chosen to do.

18                      The reason for this, Mr. Chairman, in my  
19      submission is that as the law has been stated to you by  
20      several counsel here, as that law has indicated, it is  
21      open to the proponent and in fact it is the proponent's  
22      prerogative to define the undertaking or, as Mr.  
23      Campbell put it this morning, it is up to the MNR, in  
24      this case as the proponent, to define what it is it  
25      wants the Board to approve.

1 MNR is relying I believe on the first  
2 part of the definition; that is, the provision relating  
3 to an undertaking consisting of activities. MNR has  
4 clearly stated to you that that is their position and  
5 they stated to us, by myself listening to Mr. Freidin  
6 here today and on other occasions, that it is not  
7 relying I believe on the second part of subsection (o)  
8 and, therefore, is not asking you to approve an  
9 undertaking that includes a planning process.

10 And the fact that MNR has led evidence in  
11 respect of a planning process and has suggested, and as  
12 will my clients and as I suspect will other clients of  
13 other counsel here, that your terms and conditions  
14 should contain certain provisions that speak to a  
15 process does not change what I believe to be this  
16 rather simple proposition of law. And this is all I  
17 propose to say in terms of definition of the  
18 undertaking.

19 I do, however, want to move into the  
20 second part of this matter, the licensing issue,  
21 because I think that is where many of the questions  
22 came from the Board this morning of most concern to the  
23 disposition of this motion. And the thrust of my  
24 submission on this issue is that in light of the  
25 discussion this morning and Mr. Campbell's statements

1       that Section 9 of Regulation 205 appears to operate to  
2       exclude from your review the granting of a licence - a  
3       licence as Mr. Campbell said, and I will have more to  
4       say on that in a moment - of a loan, of a grant, of  
5       debt guarantees in particular cases, but it's my  
6       submission that that also extends to any regime that  
7       MNR has or any other ministry has in place to deal with  
8       such decisions, such decisions to give those things  
9       that are mentioned in Section 9, and that is where Mr.  
10      Campbell and I, I think, part company.

11               Those decisions, those individual  
12      decisions and any regime, scheme, plan or proposal that  
13      the Ministry has to make those decisions, in my  
14      submission, are not within the purview of this Act.

15               Essentially, and this is another main  
16      thrust of my submission on this issue, and I stated  
17      this before - but it is my submission that any other  
18      interpretation of Section 9 allows this Board to deal  
19      indirectly what it cannot do directly. This Board  
20      cannot decide whether or not a particular individual, a  
21      particular group or groups or company should or should  
22      not get a licence, a loan, a grant, or a debt  
23      guarantee, and I submit that this Board cannot review  
24      any government scheme whose purpose is to establish  
25      criteria for the entering by government into what is



1       essentially I believe a contractual arrangement.

2                   I'm supported in this view, Mr. Chairman,  
3       by the definition of the word 'undertaking' contained  
4       in Section 1(o). As has been stated I believe or  
5       referred to, I believe it has a broad definition and  
6       can include activities or plans if a - once we get to  
7       an environmental assessment - a proponent chooses,  
8       unlike the Ministry here, to include that part of the  
9       definition.

10                   If you accept that a grant of a licence  
11       is an activity, the definition of undertaking is broad  
12       and should be given a broad definition such that it  
13       would include any plan or scheme for the granting of  
14       licences. The word is used in Section 9. Mr.  
15       Campbell, Mr. Freidin have indicated that we have to be  
16       careful with the use of the words, and I submit to you  
17       that the word 'undertaking' is used in the legal sense  
18       as defined and the only place we can find a definition;  
19       that is, in Section 1(o), and that definition includes  
20       a plan and a plan is a scheme, is a proposal, is a  
21       program and, therefore, Section 9 would include not  
22       only an individual grant or the individual act or  
23       decision, but also any scheme or plan to do that.

24                   And, sir, in my submission, that includes  
25       the examples you indicated this morning and the

1 examples referred to in Mr. Freidin's Notice of Motion  
2 and the examples just referred to by Mr. Campbell.

3 I disagree with Mr. Campbell that this is  
4 an evidentiary matter, I submit very much it is a  
5 jurisdictional matter based on the fact that Section 9  
6 is out there.

7 THE CHAIRMAN: Okay. Mr. Cassidy, I  
8 would like you to consider the following in light of  
9 what you have just said and your obvious disagreement  
10 with Mr. Campbell's position and presumably Mr.  
11 Freidin's position, as I understand as well, and that  
12 is: If you are right, and you have to go back to the  
13 definition of undertaking because it is not defined in  
14 the regulation anywhere, and the normal statutory  
15 interpretation I think then requires you to go back to  
16 the statute where the term used in either the statute  
17 or the regulation is in fact defined, and if you go  
18 back to the definition Section 1(o) and if you hold,  
19 for the purposes of this discussion between the Board  
20 and you at this moment, that the planning process is  
21 part of the undertaking, then what is the effect, in  
22 your view, of Section 10 as it applies to Section 9?

23 MR. CASSIDY: Section 10, sir, in my  
24 respectful submission, simply operates as the ability  
25 of a proponent who is, notwithstanding an exemption

1       that exists under that regulation or any other  
2       provision in any other regulation or the Act, who  
3       chooses, as Mr. Freidin indicated, notwithstanding that  
4       exemption, to proceed with an environmental assessment  
5       in respect of the exemption contained in the  
6       regulation, that simply says the Act applies.

7                       THE CHAIRMAN:   Okay.   Now, just hold it  
8       right there.

9                       If the proponent defines its undertaking  
10       in terms of a planning process in relation or in  
11       respect of certain activities, and that planning  
12       process includes licensing - not specific licences, but  
13       licensing as part of the planning process - then what  
14       is the effect of Section 10 and, in particular, the  
15       words that say:

16                      "Where an environmental assessment of an  
17                      undertaking is submitted..." for the  
18       purposes of this discussion...

19                      "(1) which includes a planning process  
20                      which discusses as part of it licensing,  
21                      where that is submitted, all provisions  
22                      of the Act apply in respect of that  
23                      undertaking."

24                      And presumably the provisions of the Act  
25       that would otherwise apply would be Section 6--

1 MR. CASSIDY: Mm-hmm.

2 THE CHAIRMAN: --which requires the  
3 approval of the undertaking before a licence can be  
4 issued, permit, et cetera.

5 And assume specifically, if you would and  
6 can, that scenario. I'm not saying you agree with the  
7 scenario, I'm not saying in any way that the proponent  
8 has conceded that the undertaking should be defined  
9 including the planning process; but, if it were, what  
10 is the effect of Section 10?

11 MR. CASSIDY: Then Section 10 would say  
12 that the Environmental Assessment Act applies to that  
13 undertaking which is defined by the proponent as  
14 including licensing.

15 THE CHAIRMAN: That would then, in your  
16 view, include at least the discussion of licensing in a  
17 broad sense, as opposed to specific licenses?

18 MR. CASSIDY: Well, sir, yes. I mean,  
19 the Environmental Assessment Act would contemplate  
20 that. It says: "...the full provisions of the Act  
21 apply." So whatever is encompassed within that.

22 I see Section 10 as simply a waiver  
23 provision, sir. I have to come back, however, to the  
24 practical realities of today in this case and I submit  
25 that (1) if not waived that in any fashion, in terms of



1       licensing or in terms of planning, it is not defined as  
2       part of the undertaking.

3               THE CHAIRMAN: But that, I would suggest,  
4       to you is the crux to some extent, as far as the Board  
5       is concerned, with how you tie in the provisions of  
6       Regulation 205/87, specifically Sections 9 and 10, to  
7       the concept or definition of undertaking under the Act.

8               We've heard representations from some of  
9       the parties that these things are apart -- separate and  
10      apart, have nothing to do with each other.

11              MR. CASSIDY: I'm sorry, what things are  
12      you referring to, Mr. Chairman? I've been here,  
13      but...

14              THE CHAIRMAN: Okay, sorry. That the  
15      sections of the regulation--

16              MR. CASSIDY: Yes.

17              THE CHAIRMAN: --should be looked at in  
18      isolation from whatever way the undertaking is defined.

19              MR. CASSIDY: Well, you would only look  
20      at Section 10 in the context of the other sections in  
21      the manner in which I submit is the proper way, as a  
22      waiver, as a waiver provision, Mr. Chairman, and the  
23      fact that it's standing on its own, I think, indicates  
24      that it's not only the exemption in Section 9, it's the  
25      exemption in any part of that regulation that should be

1 proper to waive.

2 THE CHAIRMAN: No, that's quite correct.  
3 In here we're dealing just with licensing, in here  
4 we're dealing with the planning process that involves  
5 licensing.

6 And so what I'm putting to you, Mr.  
7 Cassidy, is: It may not be a proper interpretation to  
8 look at Sections 9 and 10 in the absence of considering  
9 what the undertaking is in terms of its definition.  
10 That's what I'm saying to you.

11 MR. CASSIDY: Okay. I'm not submitting  
12 that you look at Section 9 or 10 as defining what this  
13 undertaking is.

14 THE CHAIRMAN: I'm not saying it defines  
15 what the undertaking is--

16 MR. CASSIDY: Right.

17 THE CHAIRMAN: --I'm saying you look at  
18 the implications of Section 10 in the context of how  
19 the undertaking has or has not been defined. That's  
20 what I'm saying.

21 MR. CASSIDY: All right.

22 THE CHAIRMAN: And your point, I think,  
23 that you have to look--

24 MR. CASSIDY: I don't have a theory.

25 THE CHAIRMAN: --for your definition of

1       undertaking as it's used in the regulation from  
2       somewhere, you have to get a meaning of that term from  
3       somewhere, and the only place you can really get that  
4       meaning is Section 1(o).

5                       MR. CASSIDY:   And my point in that  
6       regard, Mr. Chairman, is that the definition in Section  
7       1(o) can include in the concept of an undertaking a  
8       plan; and, therefore, you should give it that broad  
9       definition when construing Section 9, and a licensing  
10      scheme by any other name is a licensing plan; and,  
11      therefore, it is inappropriate for Mr. Campbell or any  
12      other counsel, in my submission, to make a distinction  
13      between individual licence and a scheme of licensing.

14                    THE CHAIRMAN:   And you may be quite  
15      correct. I'm just going one step further and saying,  
16      and if you determine that the undertaking or a plan in  
17      relation to certain activities which included in terms  
18      of the planning process licensing, then you may have  
19      application of Section 10.

20                    MR. CASSIDY:   That takes us right back to  
21      the threshold issue of the first question: What is the  
22      definition of the undertaking? And I think I'm in  
23      agreement with respect to Mr. Campbell and Mr. Freidin  
24      in that respect, that they have not so defined it. And  
25      that leads me to my next submission in terms of how

1       this issue of licensing has arisen.

2                       I think there's been a concept - and  
3       expressed very articulately, although I'm in  
4       disagreement with Mr. Campbell - in respect of the  
5       evidentiary matter, and that he's indicating that the  
6       analysis you should go through is to determine the  
7       environmental significance, or to determine the  
8       environmental impact, or to determine the environmental  
9       importance, or cause and effect relationship between an  
10      activity or a licensing or whatever and a particular  
11      party.

12                      And I realize I'm not characterizing Mr.  
13      Campbell's words precisely - and he can correct  
14      himself - but my understanding of this whole matter is  
15      quite different than that; it is not an evidentiary  
16      burden. I think the concept of it being an  
17      evidentiary burden has arisen from a belief which I  
18      have heard expressed over the course of the argument in  
19      this matter, that somehow simply because there is an  
20      environmental concern or environmental impact with  
21      respect to the way which in the Ministry proceeds on,  
22      in any fashion, that invokes the Board with  
23      jurisdiction. In other words, once there is a concern  
24      expressed with respect to licensing as having a  
25      possible environmental effect, that that gives the



1 Board jurisdiction to deal with licensing.

2 And I submit that that is not the case,  
3 that is not the well-spring of the Board's  
4 jurisdiction; the Board's jurisdiction is contained in  
5 the Act and as limited by restrictions in law, and one  
6 of the restrictions in law is Section 9, and Section 9,  
7 in my respectful submission, Mr. Chairman, along with  
8 every other exemption, is a very clear statement to  
9 this Board that although there may be environmental  
10 impacts associated with licensing such that it could  
11 affect one of the parties here. Notwithstanding that,  
12 the Legislature has spoken and said: Board, you are  
13 not to be concerned with that particular matter. And  
14 I'm suggesting that the very existence of exemptions is  
15 a recognition that that particular activity may have  
16 environmental impact.

17 And, therefore, what I'm saying to you,  
18 it is possible that a granting of a licence or a scheme  
19 for the granting of a licence may have an environmental  
20 concern. But I say to you the exemption is a clear  
21 indication that that is beyond the jurisdiction of the  
22 Board to be concerned with.

23 THE CHAIRMAN: But is not a possibility  
24 that the Legislature said: Yes, thousands of licences  
25 have to be granted in the course of administering any

1 kind of regulation over this kind of activity, each one  
2 should not require an EA, therefore, we are taking  
3 licensing per se out of the Act but providing a  
4 section, Section 10, which indicates that if  
5 licensing - not specific licences - but licensing is,  
6 part, for example, of a planning process, an integral  
7 part of a planning process which leads to the manner in  
8 which activities are regulated and that is part of the  
9 undertaking for which the EA is submitted, then Section  
10 10 provides an exception to the exemption?

11 MR. CASSIDY: Mr. Chairman, a couple of  
12 submissions. First of all, I submit that would require  
13 an express statement by the proponent that it proposes  
14 to have that aspect of its planning process submitted  
15 to the jurisdiction of the Board and quite to the  
16 contrary or the opposite for this proponent.

17 Secondly, I do not accept - and I don't  
18 wish to get into an argument with you on this, I will  
19 just state my position - I do not accept the position  
20 that licensing is an integral part of the planning  
21 process as stated within the confines of the evidence  
22 we have heard to date. And with respect to that issue,  
23 we are talking about a timber management planning  
24 process that operates on one level, and you have a  
25 separate licensing scheme which, I submit, operates on

1 another completely different level dealing with matters  
2 that will be incorporated or will be dealt with in a  
3 timber management planning concept and material we have  
4 heard to date, but I do not accept that view.

5 THE CHAIRMAN: Well, that may be part of  
6 the problem, Mr. Cassidy, in that we haven't heard all  
7 there is to hear about licensing because we are now  
8 facing the problem as to whether we should hear  
9 anything further about licensing other than what the  
10 proponent has put before us in the context of their  
11 planning process.

12 MR. CASSIDY: And I can appreciate that  
13 difficulty, sir.

14 THE CHAIRMAN: It's the chicken and egg  
15 argument.

16 MR. CASSIDY: I can appreciate the  
17 difficulty if you look at it from an evidentiary burden  
18 point of view and concern. I submit, however, that  
19 it's not that and it is a simple matter of jurisdiction  
20 and Section 9 was intended there for a reason; and that  
21 is, to indicate that licensing matters, whether they be  
22 an individual licence or a scheme, is a matter that the  
23 discretion of the Minister, for whatever reason in the  
24 wisdom of the Legislature, has decided is not within  
25 the purview of this Act.

1                   If you get into the concern of licensing  
2                   scheme versus individual licences, you automatically  
3                   fall into that trap that you've just found yourself  
4                   debating, Mr. Chairman, with yourself.

5                   And my concern is that that --

6                   THE CHAIRMAN: But it may be difficult,  
7                   Mr. Cassidy, whether we are approving it as part of the  
8                   undertaking or through conditions of approval, to  
9                   approve a planning process that does not in any way  
10                  deal with licensing or a licensing scheme.

11                  For us to approve for the future a  
12                  planning process where the proponent has admitted that  
13                  any future licences will have to be in accord with an  
14                  approved plan and the approved plan can only be  
15                  approved, the plan itself, through the exercise of an  
16                  appropriately approved by this Board planning process,  
17                  what you are saying to us effectively is that no matter  
18                  which way the proponent defines the undertaking, we  
19                  can't, as conditions of approval when dealing with the  
20                  planning process which the proponent has admitted we  
21                  can deal with as terms and conditions and so has the  
22                  Ministry of the Environment, deal with licensing in any  
23                  way.

24                  MR. CASSIDY: Mr. Chairman, there are  
25                  sometimes difficult decisions to make in life and I



1 don't want to make generalized statements except to  
2 suggest to you that the impact of Section 9 is very  
3 clear to that in respect of your discretion to deal  
4 with these matters.

5 And, Mr. Chairman, I know that the Board  
6 is anxious to deal with all aspects of the social and  
7 the environmental concerns that impact on the people of  
8 northern Ontario, indeed the whole province, and we are  
9 all anxious to make sure that matters are dealt with in  
10 the best fashion, but I suggest to you, sir, that there  
11 are statutory and regulatory limits on jurisdiction  
12 which, although we have high intentions, cannot be  
13 overlooked.

14 THE CHAIRMAN: Unless the interpretation  
15 of the statute which we are all involved in right now,  
16 including the regulations, result in the Board and the  
17 parties seeing eye to eye, being ad idem on all  
18 questions of interpretation.

19 Obviously we are hearing your views, we  
20 have heard the Ministry of the Environment's views, we  
21 have heard the Ministry of Natural Resources' views, no  
22 doubt we are going to hear Mr. Lindgren's clients'  
23 views and perhaps Mr. Colborne's clients' views, and I  
24 can assure you, I think from what we have heard already  
25 last day, all of those views don't coincide

1 necessarily.

2 MR. CASSIDY: Yes.

3 THE CHAIRMAN: It's up to us I think at  
4 some point to assimilate everything we have heard and  
5 come out with what we believe to be the appropriate  
6 interpretation of these sections and, if you disagree  
7 with our interpretation, I suppose there is another  
8 forum to which all can apply.

9 MR. CASSIDY: I trust your remarks are  
10 aimed at all of the counsel on that, Mr. Chairman?

11 THE CHAIRMAN: No, no, this is to  
12 everybody and not just your clients specifically.

13 MR. CASSIDY: With that in mind I don't  
14 propose to comment further in respect of what you have  
15 just said. I don't interpret it as a question that I  
16 need answer, so I will just finish my remarks; and that  
17 is, that I repeat that I do not accept that it's an  
18 evidentiary burden, and the jurisdiction of this Board  
19 is not dependent on a party showing that there is an  
20 environmental impact, either positive or negative, on  
21 them, which I think could be the only evidentiary  
22 burden that Mr. Campbell has in mind when you really  
23 think about it.

24 And, therefore, for that reason, the  
25 jurisdiction is a legal matter and I urge you to

1 consider the interpretations I have given it.

2 If I could just have a minute, Mr.

3 Chairman.

4 THE CHAIRMAN: Very well.

5 MR. CASSIDY: Thank you. Those are my  
6 comments.

7 MRS. KOVEN: Excuse me, Mr. Cassidy.

8 MR. CASSIDY: Yes.

9 MRS. KOVEN: Just one question. In  
10 looking at Regulation 205, why is it that your  
11 interpretation would be the correct one when the  
12 Minister of the Environment, who authored these  
13 regulations, has a different interpretation?

14 MR. CASSIDY: Well, as I understand it,  
15 there is a matter of statutory interpretation that does  
16 not always require you to go back to the drafter of the  
17 legislation or the Ministry which is responsible for  
18 that legislation for the definitive word.

19 In fact - and I don't mean to be  
20 preaching here, and my colleagues can disagree with me  
21 if they wish - but, as I understand it, Ms. Koven, part  
22 of your jurisdiction is to interpret the legislation  
23 before you and, therefore, it is open to you to attach  
24 the interpretation which you feel is appropriate having  
25 considered the matter, acting of course within the

1 confines of legal principles; and, therefore, make your  
2 determination separate and apart from what whatever  
3 persuasive comments I'm sure Mr. Campbell had this  
4 morning, and also recognizing, of course, that there  
5 are reviewable bodies which can take issue with that if  
6 some party wishes to raise it.

7 I hope I haven't misstated Mr. Campbell's  
8 views on that or any of the other colleagues.

9 MRS. KOVEN: No. No, my concern was not  
10 so much whether Mr. Campbell was persuasive or not, but  
11 what the intent was when these regulations were set  
12 out.

13 MR. CASSIDY: Yes. Are you referring to  
14 the Environmental Assessment Guideline Update, I  
15 believe it is called?

16 If you are, I submit that, nevertheless,  
17 your jurisdiction to deal with it and the  
18 interpretation you deem appropriate still governs and  
19 you are not fettered in your view. Subject to the  
20 persuasive powers of Mr. Freidin or any other party to  
21 convince you that's the right view, you still have  
22 jurisdiction to make the decision.

23 If other counsel want to respond to that  
24 question, I'm not the only source of that legal  
25 knowledge. I guess I am.



1                   MR. CAMPBELL: Well, I can only say that  
2                   the rule of statutory interpretation also goes on to  
3                   say that matters such as the EA Update become -- or can  
4                   assist the Board in reaching a conclusion on the  
5                   correct interpretation, particularly under the  
6                   situation where the Board feels there is any lack of  
7                   clarity in the specific wording of the provision.

8                   THE CHAIRMAN: Much in the same as  
9                   government policy; would you say, Mr. Campbell?

10                  MR. CAMPBELL: An excellent analogy, Mr.  
11                  Chairman.

12                  MR. CASSIDY: Subject of course to the  
13                  restrictions in the exemptions, Mr. Chairman, on that.

14                  I have no further comments, unless there  
15                  are any further questions from the members.

16                  THE CHAIRMAN: Thank you.  
17                  Mr. Lindgren?

18                  MR. LINDGREN: Thank you. Could I have a  
19                  moment.

20                  Mr. Chairman, although Mr. Freidin and  
21                  Mr. Campbell, and now Mr. Cassidy, have all spoken to  
22                  the licensing motion that we argued last week, I will  
23                  resist the temptation of rearguing my position on that  
24                  matter. I think it's fair to say we still stand by our  
25                  submissions last week; and, that is, licensing and the

1       licensing regime is clearly an integral part of this  
2       undertaking. It is in fact the preferred means of  
3       carrying out this undertaking and, for that reason, it  
4       is squarely before this Board.

5                       Having said that, Mr. Chairman, I will to  
6       start by confining my remarks to the narrow issue that  
7       I understood was to be addressed this morning; that is,  
8       what is in front of the Board for approval, what is the  
9       Ministry seeking approval for.

10                      And at the outset, Mr. Chairman, let me  
11       be very clear about our position. In our view the  
12       undertaking is the planning process respecting the four  
13       activities of access, harvest, renewal and maintenance.  
14       Notwithstanding Mr. Freidin's submissions, Mr.  
15       Chairman, this is what is in fact described in the  
16       Class EA and has been described in the evidence led by  
17       the Ministry to this point.

18                      We submit that the undertaking cannot be  
19       possibly limited to the four activities per se as Mr.  
20       Freidin has suggested this morning. With respect, Mr.  
21       Chairman, that suggestion defies all common sense and,  
22       more importantly, it cannot be supported by the  
23       relevant provisions of the Environmental Assessment Act  
24       and that suggestion is in fact inconsistent with the  
25       Class EA itself and the other evidence led by the

1 Ministry. I will explain each of those submissions in  
2 a moment, Mr. Chairman.

3 I would begin by referring to the general  
4 nature of Class EAs in this province. Mr. Freidin  
5 commenced his submissions on the same point and I think  
6 it was proper for him to do so. I think it's necessary  
7 to look at the general nature of the Class EA approach  
8 in order to determine what this undertaking, what this  
9 Class EA is all about.

10 Now, as you know, Mr. Chairman, there are  
11 already a number of approved class environmental  
12 assessments in this province despite the somewhat  
13 dubious or murky legal status of Class EAs. But  
14 leaving aside that issue for a moment, Mr. Chairman -  
15 and I will return to it - I think it's fair to say that  
16 the Class EA approach has evolved in this province in  
17 the recognition that it may be desirable to have a  
18 generic environmental assessment for the planning of  
19 certain classes of projects, projects that are small in  
20 scale, projects that recur frequently, projects which  
21 have limited or minor environmental effects.

22 Now, on this point, Mr. Chairman, I would  
23 like to refer to another copy of the EA Update, not the  
24 one that was produced last week, but in fact the 1977  
25 EA Update. I would like to refer to this document

1       because, in our view, it contains passages that are  
2       helpful to the Board in its determination of this  
3       issue. 1977.

4                       I have extracts of the relevant portions,  
5       Mr. Chairman, I propose to distribute them to the Board  
6       and to the parties at this time.

7                       THE CHAIRMAN: Very well.

8                       MR. LINDGREN: (handed)

9                       MR. FREIDIN: Do you want to make it an  
10       exhibit?

11                      MR. LINDGREN: No.

12                      THE CHAIRMAN: You are not submitting it  
13       Mr. Freidin so, therefore, we will not admit it.

14                      MR. CAMPBELL: It is a good rule. I  
15       think this...

16                      MR. FREIDIN: (inaudible)

17                      THE CHAIRMAN: Could I just ask, does the  
18       numbering scheme for these EA Updates start off with  
19       Volume I for the particular year in question and then  
20       if there is a second issue within the same calendar  
21       year it is Volume II, because the one that you  
22       originally submitted to us was Volume I, No. 2. This  
23       looks like Volume II, No. 1.

24                      Is this just the second EA Update or is  
25       this one a long series?



1 MR. LINDGREN: Well, as you know, Mr.  
2 Chairman, there is a long series of EA Updates.

3 THE CHAIRMAN: I would have thought so.

4 MR. LINDGREN: It is my understanding  
5 that this is in fact the second issue of that series.  
6 It follows --

7 THE CHAIRMAN: For that year?

8 MR. LINDGREN: No, I think it follows the  
9 1976 issue which was filed last week. I stand to be  
10 corrected of course by Mr. Campbell if perhaps he can  
11 contact the Environmental Assessment Branch, that is  
12 the group responsible for this publication.

13 THE CHAIRMAN: Okay. So the next issue  
14 would be Volume III, et cetera, and so on?

15 MR. LINDGREN: That is my understanding.

16 THE CHAIRMAN: Okay. Very good.

17 MR. LINDGREN: In any event, Mr.  
18 Chairman, having regard to the second page in this  
19 extract, the top of the page is numbered page 7, and  
20 there is an item entitled: Project Requiring an  
21 Environmental Assessment, and there is some discussion  
22 of what the Environmental Assessment Act may require,  
23 and towards the bottom of the page there is a subtitle  
24 or subheading entitled: Individual and Class  
25 Environmental Assessments.

1                   And I think the first line of that  
2 paragraph is significant, Mr. Chairman. There is an  
3 indication from the Environmental Assessment Branch  
4 that:

5                   "An environmental assessment can be  
6 carried out on an individual project or  
7 for a class of projects. The latter  
8 would apply to smaller, frequently  
9 recurring undertakings where a common set  
10 of procedures for construction and  
11 implementation can be identified."

12                  And the paragraph goes on to offer an  
13 example involving Ministry of Transportation and  
14 Communications.

15                  Having regard for that statement, I would  
16 ask the Board to turn to the last page of this document  
17 which is numbered page 15. This is in fact part of an  
18 EA Glossary put together by the Ministry of the  
19 Environment, and on page 15, the second full paragraph,  
20 there is a discussion of what a Class EA is and, again,  
21 at the top of that paragraph there is an indication  
22 that:

23                  "Relatively small, frequently recurring  
24 projects which are similar in nature  
25 may be covered by class environmental

1 assessments. That is, where a common set  
2 of procedures for planning, construction  
3 and implementation can be identified for  
4 a project type, an environmental  
5 assessment document for that project type  
6 will be prepared under the Act and  
7 submitted to the Minister of the  
8 Environment for review."

9 Mr. Chairman, I think the passages I have  
10 just referred you to are perhaps the earliest  
11 indications from the EA Branch that a Class EA is  
12 essentially a common planning procedure for frequently  
13 recurring projects that are small and similar in  
14 nature.

15 Now, before I leave this document, Mr.  
16 Chairman, I must also refer the Board to page 8. Page  
17 8 commences with an item entitled: List of Projects  
18 Requiring an Environmental Assessment, and it sets out  
19 various ministries, the MOE, the Ministry of Government  
20 Services, and then on to the next page, page 9, Ontario  
21 Hydro and the kinds of activities that require  
22 environmental assessment.

23 Significantly on page 10, Mr. Chairman,  
24 there is a list of MNR projects that require  
25 environmental assessment. This is subparagraph F),

1       subparagraph 1. There is an indication that:

2                       "The following projects are included  
3                       except where implementation of the  
4                       plan has been commenced prior to July  
5                       1, 1978:

6                       The activity of implementing plans in  
7                       connection with:

- 8                       a) Road maintenance  
9                       b) Forest management  
10                      c) Seismic exploration..."

11                     Mr. Chairman, I think that is highly  
12       significant. The Board must have regard for that  
13       statement. It is significant that this statement does  
14       not speak of the four activities of access, harvest,  
15       renewal and maintenance; it speaks of the activity of  
16       implementing plans in connection with forest  
17       management. That, in my view, is what the EA Branch  
18       thought the then current exemption covered.

19                     Now, just to finish the story off here,  
20       Mr. Chairman, before the Act did kick in to apply to  
21       plans commenced after July 1, 1978 the MNR received  
22       another exemption order extending the exemption to  
23       December 31, 1979. That exemption order has been filed  
24       as Exhibit 21 in this hearing.

25                     Now, before I leave this point and this



1 document, Mr. Chairman, I would like to briefly refer  
2 to the current exemption order MNR 11-9. As you have  
3 heard many times, Mr. Chairman, this exemption relates  
4 to an undertaking; namely, forest management by the  
5 Ministry of Natural Resources on Crown land presently  
6 included within forest management units and associated  
7 tree nurseries.

8 Mr. Chairman, I don't intend to raise  
9 again the distinction between timber management and  
10 forest management, but I would like to draw the Board's  
11 attention to the rest of this exemption order and there  
12 are, I think, two significant points to be made.

13 THE CHAIRMAN: What was that filed as?

14 MR. LINDGREN: The 1978/79 exemption  
15 order was filed as Exhibit 21. MNR 11-9, I am not sure  
16 if it has been filed.

17 MR. FREIDIN: 11-9 was not filed, Mr.  
18 Chairman, 11-9 is dated 1984. I can't remember the  
19 circumstances under which that particular document  
20 wasn't filed. Exhibit 21, there is only one exhibit  
21 filed.

22 THE CHAIRMAN: Are you going to file that  
23 with us?

24 MR. LINDGREN: I don't have multiple  
25 copies at this point but I can make copies available.

1                   Mr. Chairman, the first point to be made  
2                   with respect to the current exemption order is that --

3                   THE CHAIRMAN: We might as well give that  
4                   one an exhibit number.

5                   MR. LINDGREN: Okay.

6                   THE CHAIRMAN: That will be Exhibit No.  
7                   99...

8                   MS. BLASTORAH: Three, I believe.

9                   MR. LINDGREN: Three, I believe.

10                  THE CHAIRMAN: 993.

11                  ---EXHIBIT NO. 993: Exemption order MNR 11-9.

12                  MR. LINDGREN: The first point I wanted  
13                  to make in relation to the exemption order, which is  
14                  now Exhibit 993, is that forest management is not  
15                  defined and, in particular, it is not defined as the  
16                  four activities of access, harvest, renewal and  
17                  maintenance. That is self-evident on the reading of  
18                  this exemption order.

19                  Secondly, and perhaps more importantly,  
20                  the text of the exemption order, the reasons for the  
21                  exemption order, and the conditions attached to the  
22                  exemption order all speak of plans, planning, planning  
23                  matters or programs; the exemption order does not  
24                  specifically address or list the physical activities of  
25                  access, harvest, renewal or maintenance. It does not

1 list those activities as the undertaking exempt from  
2 the Act.

3 I would also point out, Mr. Chairman,  
4 that in paragraph 8 of this exemption there is an  
5 indication that if a class environmental assessment for  
6 forest management has been submitted by the MNR before  
7 December 31st, 1985 this order shall remain in effect  
8 until a decision on approval is made with respect to  
9 the class environmental assessment, but if such an  
10 environmental assessment is not submitted this order  
11 shall cease to apply.

12 Mr. Chairman, I think it's clear under  
13 the terms of this exemption order this Ministry was and  
14 is compelled to prepare and submit a class  
15 environmental assessment.

16 Mr. Freidin this morning stated that in  
17 his view there is really no distinction between a Class  
18 EA and an individual EA, in fact there is no such  
19 animal as a Class EA. I think it is a little late in  
20 the day to make that argument, Mr. Chairman, and in  
21 fact this proponent was required to submit and file an  
22 environmental assessment.

23 That's all I intend to say on the current  
24 exemption order, Mr. Chairman, and I would respectfully  
25 ask that the Board have regard to the exemption order

1       when it determines what constitutes the undertaking in  
2       this proceeding.

3                       Now, returning to the issue of class  
4       environmental assessments in general, Mr. Chairman, we  
5       submit that further support for our position - which is  
6       that Class EAs are essentially planning documents -  
7       further support for that position is found in the  
8       Ministry of the Environment's 1981 General Guidelines  
9       for the Preparation of Environmental Assessments.

10                      Now, this morning Mr. Freidin and Mr.  
11       Campbell have referred to passages from that document,  
12       they haven't, in our view, referred to all of the  
13       relevant passages and I would propose to file those at  
14       this time as well. (handed)

15                      THE CHAIRMAN: Was this the document, Mr.  
16       Campbell, that you referred to as Section 15 this  
17       morning?

18                      MR. LINDGREN: I believe he was referring  
19       to page 15.

20                      THE CHAIRMAN: Page 15.

21                      MR. CAMPBELL: Page 15 and, yes, this is  
22       the document.

23                      MR. LINDGREN: You can see on page --

24                      THE CHAIRMAN: What are we going to do  
25       with this document?



1 MR. FREIDIN: Mark it as an exhibit, Mr.  
2 Chairman.

3 THE CHAIRMAN: Exhibit 994.

4 ---EXHIBIT NO. 994: Ministry of Environment 1981  
5 General Guidelines for the  
6 Preparation of Environmental  
Assessments.

7 MR. LINDGREN: Mr. Chairman, I would like  
8 to commence by referring to page 15 of this document.  
9 You will note that under the first heading there is a  
10 general discussion of what an undertaking is within the  
11 meaning of Section 1(o) of the Act and I believe Mr.  
12 Campbell read the second full paragraph and that  
13 heading into the record; and, that is:

14 "An undertaking may be in the form of a  
15 physical project, such as a road or  
16 electric generating station, or be more  
17 abstract such as a plan, program or  
18 activity."

19 Then towards the bottom of the page there  
20 is a discussion of specific versus class undertakings.  
21 This discussion begins at the bottom of page 15 and  
22 continues on to the top of page 16, and in the first  
23 full paragraph on page 16 there is a statement to the  
24 effect that:

25 "A 'Class' undertaking is one in which

1                   the proponent asks for approval of the  
2                   undertaking based on a decision-making  
3                   process which he describes now, but which  
4                   he proposes to carry out in the future."

5                   Stopping right there, Mr. Chairman. That  
6                   decision-making process is described in a class  
7                   environmental assessment and, in fact, it is our  
8                   submission that the decision-making process or the  
9                   planning process, whatever you wish to call it, is in  
10                  fact contained in this class environmental assessment.

11                  In any event, continuing on, on page 16  
12                  we see a paragraph c), "Class" Undertakings. Again,  
13                  there is a discussion of the use of the Class EA and it  
14                  is basically to deal with projects that are relatively  
15                  small and recur frequently and have generally a  
16                  predictable range of effects.

17                  Then turning to page 17, Mr. Chairman, in  
18                  the first full paragraph there is a statement that:

19                  "The Class EA, then, describes the  
20                  planning process to satisfy the  
21                  requirements of the Act which the  
22                  proponent proposes to follow, each time a  
23                  project within that class is undertaken  
24                  in the future."

25                  Now, Mr. Chairman, that is a very

1 significant paragraph and I ask the Board to refer to  
2 it and rely upon it. And, as well, I would direct --

3 THE CHAIRMAN: The one you have just  
4 read?

5 MR. LINDGREN: That's correct.

6 THE CHAIRMAN: And what do you ascribe  
7 the meaning to the words:

8 "The Class EA, then, describes the  
9 planning process..."?

10 MR. LINDGREN: It says just what it says.  
11 The Class EA describes, contains or sets out a planning  
12 process that satisfies the requirements of the Act and  
13 that which the proponent proposes to follow in the  
14 future if approval is given.

15 THE CHAIRMAN: Just one moment.

16 MR. LINDGREN: Certainly.

17 THE CHAIRMAN: Do you see any  
18 significance, Mr. Lindgren, in tying in the words of  
19 that paragraph to the definition of environmental  
20 assessment which is 1(d) of the Act?

21 MR. FREIDIN: The definition of...?

22 THE CHAIRMAN: Environmental assessment,  
23 which states:

24 "Environmental assessment when used in  
25 relation to an undertaking means an

1 environmental assessment submitted  
2 pursuant to Section 5(1)."

3 If you take those words and try to apply  
4 them to the wording of that paragraph you just read  
5 which says:

6 "The Class EA, then, describes the  
7 planning process...."

8 MR. LINDGREN: The link, Mr. Chairman, I  
9 think is the definition of the word 'undertaking'. The  
10 EA describes the undertaking. The undertaking in this  
11 instance is the planning process in our view. That is  
12 the link between environmental assessment and the  
13 undertaking.

14 The undertaking of course, Mr. Chairman,  
15 is the proponent's preferred means of carrying out  
16 something. In our view, that something is the planning  
17 process, that is what the undertaking is in this  
18 proceeding.

19 Mr. Chairman, I would submit I am further  
20 supported in that view; i.e., that the Class EA is  
21 essentially a planning document, further support for  
22 that position is found at the bottom of page 17 of this  
23 document where, again, there is an indication that:

24 "The Class EA document should outline in  
25 general terms a common set of procedures



1                   for the planning, design and  
2                   implementation of the project type..."  
3       and it goes on to indicate what else it should contain  
4       to satisfy the requirements of the Act.

5                   Finally, just to finish off this  
6       document, Mr. Chairman, I would refer you to page 18,  
7       the last full paragraph which states at the beginning  
8       of the paragraph:

9                   "The Class document represents a  
10                  commitment by the proponent to the  
11                  government and the public to follow the  
12                  environmental planning process described  
13                  in it, each time a project within that  
14                  class is undertaken."

15                  Mr. Chairman, we submit that this is yet  
16       another indication from the Ministry of the Environment  
17       that a Class EA is intended to be a common planning  
18       process for a certain set of activities or projects. I  
19       don't suggest that the Board is necessarily bound by  
20       these pronouncements, but as you have properly pointed  
21       out, Mr. Chairman, the Environmental Assessment Act is  
22       the MOE statute and certainly any views of the Ministry  
23       or Ministry staff on that subject should be carefully  
24       considered by this Board.

25                  Just to summarize my submissions on that

1 point, Mr. Chairman, it is our position that the common  
2 element of the approved Class EAs in this province is  
3 that they set out a common set of planning procedures  
4 for projects that are small scale, recur frequently and  
5 have limited environmental effects.

6 Now, keeping those introductory remarks  
7 in mind, Mr. Chairman, let me turn now to this Class EA  
8 and to the evidence supported or adduced in support  
9 thereof.

10 Now, last week, Mr. Chairman, Ms. Seaborn  
11 took the Board through some of the passages in the text  
12 of the Class EA to support her view that the planning  
13 process is before the Board and she referred in  
14 particular to page 14 to 16 of this document which is  
15 Exhibit 4. I don't intend to reread those passages;  
16 however, there is an additional passage that she did  
17 not read and I would like to bring the Board's  
18 attention to it and that is found at page 16,  
19 commencing at line 29, where the proponent indicates:

20 "MNR has submitted a class environmental  
21 assessment because it is the most  
22 appropriate vehicle for defining a common  
23 and consistent planning process and for  
24 ensuring that the purpose of the  
25 Environmental Assessment Act is

1                   attained."

2                   In my submission, Mr. Chairman, that is a  
3                   clear indication from the proponent that that  
4                   undertaking is a planning process for the four  
5                   activities. That is what this proponent is seeking  
6                   approval for, notwithstanding how the undertaking may  
7                   be so narrowly described at the beginning of this  
8                   document. And I will have more to say on that in a  
9                   moment, Mr. Chairman.

10                  I would like to refer to some of the  
11                  evidence or just one portion of the evidence that I  
12                  believe supports our position. I am referring to  
13                  Document No. 2 of the Panel 17 witness statement and  
14                  that is Exhibit 984. I would like to refer the Board  
15                  to page 115 of the witness statement.

16                  THE CHAIRMAN: Do we have that?

17                  MR. LINDGREN: You should, Mr. Chairman.  
18                  It is the Panel 17 witness statement.

19                  THE CHAIRMAN: Sorry, page what?

20                  MR. LINDGREN: Page 115, sir.

21                  There is a subtitle or subheading  
22                  entitled: Justification of the Class EA Approach for  
23                  Timber Management, and picking up on Mr. Freidin's  
24                  comments this morning, this must be read as the factual  
25                  justification for the Class EA and not the legal

1 justification.

2 The first paragraph under that heading  
3 reiterates what I have said moments ago, and that is:

4 "The Class EA approach has been developed  
5 for small scale projects with generally  
6 predictable ranges of effects which are  
7 relatively minor."

8 The more important paragraph, Mr.  
9 Chairman, is the one commencing at the bottom of the  
10 page:

11 "In all class environmental assessments  
12 that have been approved to date, a  
13 planning process is ascribed which  
14 will apply to any projects to be carried  
15 out under the approved Class EA in the  
16 future."

17 Stopping right there, Mr. Chairman. I  
18 think that is another indication that this Ministry,  
19 this proponent intended the planning process to be the  
20 undertaking in this case.

21 MR. FREIDIN: Don't be...

22 MR. LINDGREN: Mr. Freidin, you can reply  
23 to this in reply.

24 MR. FREIDIN: I have made my submission.  
25 I don't see how he can suggest that we are asking for



1 approval of something that we are not asking approval  
2 for, and to say that we interpret words to mean  
3 what we say they don't mean or weren't intended to  
4 mean, what benefit is that going to do to anybody?

5 THE CHAIRMAN: No, that's a fair comment,  
6 Mr. Freidin.

7 Mr. Lindgren, we have Mr. Freidin's  
8 position on what he means and his client means in terms  
9 of how they describe the undertaking. You may take  
10 issue with that, but I think it's unfair to say that  
11 they mean something other than what they have said they  
12 mean.

13 MR. LINDGREN: Well, that's true, Mr.  
14 Chairman. I'm just merely indicating what we interpret  
15 this document to mean.

16 THE CHAIRMAN: That's what you interpret  
17 it to mean.

18 MR. LINDGREN: And I think it's a  
19 reasonable interpretation and it speaks to the issue  
20 before the Board today; and, that is, what is the  
21 undertaking, and I'm trying to look at what the  
22 evidence has been in order to discern what the  
23 undertaking is. But your comment is a fair one and I  
24 will move on.

25 I would just point out that in the rest

1 of this document there are similar passages about the  
2 common planning process. I don't intend to refer  
3 specifically to each one of them, but I would ask the  
4 Board to look at this document carefully.

5 The one comment that I would specifically  
6 draw your attention to is page 119, the first full  
7 paragraph, where there is an indication that:

8 "OMNR also contends that the common  
9 planning process described in the Class EA  
10 ensures the protection of the environment  
11 is achieved through the comprehensive  
12 planning of operations in areas where  
13 other values occur..." and so on, and so  
14 on.

15 I don't intend to read the rest of that  
16 into the record. I would only ask that this Board have  
17 regard for that statement and the other ones set out in  
18 this document.

19 Now, Mr. Chairman, last week and again  
20 this morning Mr. Freidin has said that the Ministry is  
21 seeking approval only for the four activities; however,  
22 the Ministry is willing to live with a term and  
23 condition that sets out a planning process, presumably  
24 one that resembles the process submitted by the MNR in  
25 its terms and conditions.

1                   Furthermore, Mr. Chairman, my notes from  
2                   last week indicate that Mr. Freidin also stated that it  
3                   doesn't make a difference whether the Board approves  
4                   the process as part of the undertaking or imposes a  
5                   process as a term and condition - and I trust that  
6                   quote is accurate - and I believe he has made the same  
7                   comment this morning.

8                   Mr. Chairman, if that is the case and if  
9                   that is the Ministry position, then I fail to  
10                  understand why the Ministry has steadfastly refused to  
11                  acknowledge that the planning process is in fact the  
12                  undertaking before us.

13                  MR. FREIDIN: Well, I dealt with that in  
14                  my submissions. If you didn't hear me on that...

15                  MR. LINDGREN: I heard them, but I don't  
16                  understand them, Mr. Chairman, and I don't understand  
17                  them because that argument simply cannot be sustained  
18                  on the facts.

19                  Mr. Chairman, you in fact raised this  
20                  point repeatedly last week with Mr. Freidin. In this  
21                  Class EA one cannot artificially divorce the planning  
22                  process from the physical activities that are being  
23                  planned and implemented in the area of the undertaking.  
24                  The activities are not carried out in the abstract,  
25                  instead they are planned, implemented, regulated

1 through the planning process.

2 In other words, Mr. Chairman, as you  
3 pointed out last week, you need a framework of some  
4 sort to deliver those activities, the activities of  
5 access, harvest, renewal and maintenance. If this  
6 Board -- if the parties are only looking at the four  
7 activities, then we agree with your further comment,  
8 Mr. Chairman, that this proponent will have difficulty  
9 justifying the Class EA approach under the definition  
10 of 'undertaking' that appears in Section 1(o) and as  
11 well in the application section, Section 3(a) and Mr.  
12 Freidin referred the Board to that section again. I  
13 don't intend to read it into the record.

14 Our view is simply this, Mr. Chairman:  
15 This Class EA and this undertaking can only be before  
16 this Board if the undertaking is a program, plan or  
17 proposal in respect of an enterprise or activity. That  
18 is the only hook on which the MNR can hang its Class EA  
19 hat on under the Act.

20 As I mentioned at the outset, Mr.  
21 Chairman, the statutory basis for the Class EA approach  
22 is very nebulous in this province, it's not clear at  
23 all, and it's extremely tenuous. I'm surprised that  
24 Mr. Freidin would jeopardize his undertaking by not  
25 calling it a plan in respect of an activity. That is



1 the only way, in our view, he can fit within Section  
2 1(o).

3 I think the rather tenuous nature of the  
4 Class EA approach is fairly well understood, I don't  
5 think any of the parties take serious dispute with  
6 that.

7 MR. FREIDIN: I do.

8 MR. LINDGREN: With the exception of Mr.  
9 Freidin.

10 MR. FREIDIN: I think some other people  
11 here do.

12 MR. CAMPBELL: I'm trying not to  
13 interrupt, Mr. Chairman.

14 MR. LINDGREN: Well, we'll hear from  
15 those parties later who disagree.

16 THE CHAIRMAN: I can assure you if it  
17 were all that simple the Board wouldn't have spent what  
18 is probably going on three days now talking about these  
19 issues.

20 I would suggest that it is a concept that  
21 is not well understood, it is not well articulated in  
22 the Act, the precedents that do exist are scarce.  
23 There has never been one that has been subjected to a  
24 public hearing where these matters as to what  
25 constitutes a Class EA have been publicly debated to

1       the extent that they have before this Board, and I  
2       would also suggest, quite frankly, that the  
3       consideration given to some of these issues by the  
4       courts, both the Divisional Court and the Court of  
5       Appeal, were done with reference to one set of facts  
6       only, one case only and that case did not necessarily  
7       represent a Class EA, at least in the context with  
8       which this application is being put before the Board.

9                       And therefore again, as I think I  
10       mentioned last week, with the greatest of respect to  
11       the courts, their decision in that matter might well be  
12       distinguishable in terms of the facts of this  
13       particular case and in view of the fact that this  
14       application represents presumably more of what is  
15       accepted to be the Class EA approach than the case in  
16       which the courts made certain interpretations of  
17       concepts such as undertaking as defined in the Act, who  
18       gets to define it, under what circumstances, as well  
19       as, I would suggest even going further, the concepts  
20       articulated by the court in terms of alternatives to ,  
21       and alternative methods of carrying out the  
22       undertaking.

23                      The Board is not for a moment ignoring  
24       the pronouncements of courts which have considered the  
25       issues which may be relevant to what is before the

1 Board. The question in the Board's mind to some extent  
2 though is: Are we dealing with all of the issues in  
3 the same context as those dealt with by the courts and  
4 does the court decision shed more light on what should  
5 be the appropriate interpretation of the statute with  
6 respect to a class environmental assessment.

7 And this is why I would suggest that we  
8 have spent the last three days trying to hash all of  
9 this out. Because this Board will be charged with the  
10 duty of coming to some interpretation, which may or may  
11 not be in accord with the courts' interpretation under  
12 a specific set of facts in the Hydro case, and we want  
13 to assure ourselves that we have the fullest  
14 appreciation of the views of all parties in this matter  
15 in order that the Board can come to what it considers  
16 to be an appropriate determination.

17 If parties disagree with the Board's  
18 interpretation, it may well end up back in the courts  
19 for a further consideration, but the Board would  
20 suggest that if it does reach the courts in that  
21 fashion, they will be looking at it this time in the  
22 context of a class environmental assessment, and the  
23 courts may well be prepared to shed further light on  
24 what the appropriate interpretations should be, should  
25 they choose to disagree with what the Board's

1 interpretation will be as a result of this motion.

2 MR. LINDGREN: I think your comments are  
3 well taken, Mr. Chairman. I will speak briefly to the  
4 Ontario Hydro case towards the end of my submissions.

5 At this point I would like to move on to  
6 my next set of submissions as it were, and that is  
7 simply this: The Ministry cannot possibly argue that  
8 it is seeking approval for an activity or a set of  
9 activities known as timber management. The Ministry  
10 can't possibly be seeking approval for those activities  
11 because in fact the Ministry does not carry out those  
12 activities.

13 Now, Mr. Chairman, this is a  
14 generalization of course, but this is an important  
15 point and it's one that I think has been overlooked to  
16 this stage of the discussions. The Ministry itself  
17 does not generally carry out the four activities.

18 Now, to be fair, the Ministry may spray  
19 chemical insecticides from time to time, it may  
20 contract out silvicultural work on Crown management  
21 units, but by and large, and to my knowledge, Mr.  
22 Chairman, the proponent here does not engage in the act  
23 of harvest. Therefore, speaking very generally, Mr.  
24 Chairman, in the area of the undertaking the four  
25 activities in question are not carried out by the



1       proponent, instead they are in fact carried out by  
2       private companies such as FMA holders.

3                   Our position is this, Mr. Chairman: The  
4       Ministry cannot be seeking approval for only the four  
5       activities because it doesn't do any of the four  
6       activities; it doesn't clearcut thousands of hectares,  
7       what it does is plan and regulate that activity.  
8       Therefore, in our view, what the Ministry must be  
9       seeking approval for is the planning process under  
10      which those activities are publicly regulated.

11                   I have made my submissions or some  
12      submissions on the meaning of Section 1(o) of the Act  
13      and it is our submission that the undertaking must be a  
14      plan in respect of an activity or otherwise we wouldn't  
15      be here. I will flush that one out in a minute, Mr.  
16      Chairman.

17                   The other section I would like to refer  
18      to is the definition of 'proponent' under the Act which  
19      is Section 1(k):

20                   "The proponent is defined as a person  
21                   who:

22                   1) carries out or proposes to carry out  
23                   an undertaking."

24                   Well, that is clearly inapplicable in  
25      this case, Mr. Chairman, the Ministry does not carry

1 out the four activities in question.

2 The definition goes on to paragraph 2) --

3 THE CHAIRMAN: Just a second. Slow down,  
4 please.

5 MR. LINDGREN: Okay.

6 THE CHAIRMAN: Okay.

7 MR. LINDGREN: Mr. Chairman, I'm now  
8 referring to the second branch of the definition of  
9 'proponent' which is:

10 "The owner or person having charge,  
11 management or control of an undertaking."

12 Mr. Chairman, I think the evidence  
13 establishes that this Ministry does not carry out the  
14 activities in question, what it does is manage those  
15 activities through the planning process.

16 That, to use the word I used earlier, Mr.  
17 Chairman, is the hook that this Ministry is a proponent  
18 within the meaning of the Environmental Assessment Act.  
19 It manages; i.e., it plans for the activities in  
20 question.

21 And as I indicated earlier, Mr. Chairman,  
22 this is significant because it's the only legal  
23 explanation of why we are here under the Environmental  
24 Assessment Act.

25 In the area of the undertaking, Mr.

1 Chairman --

2 THE CHAIRMAN: I sure as heck hope that  
3 there is a reason why we are here 20 months after we  
4 first arrived.

5 MR. LINDGREN: Mr. Chairman, the four  
6 activities, as I have indicated, are essentially  
7 private sector activities, they are carried out by  
8 private companies whose specific activities could not  
9 be before this Board unless the companies were  
10 designated by the Minister and, in our view, that is  
11 clear on the reading of Section 3(a) and 3(b).

12 The significance of that submission, Mr.  
13 Chairman, is this: What the Board must be assessing in  
14 this case is the public sector role in this matter;  
15 that is, the planning process proposed by MNR. I would  
16 suggest that the proponent and the parties and this  
17 Board are here only because of the public sector  
18 element. And this element, in our view, is the  
19 planning process and that is the undertaking, in my  
20 submission, Mr. Chairman.

21 Now, let me explore some of the practical  
22 consequences of that submission. If, for example, the  
23 Board finds that the undertaking is the four activities  
24 only, what are the MNR actions that they can receive  
25 approval for. As I have pointed out several times, Mr.

1 Chairman, the MNR does not carry out these activities,  
2 these activities are private sector activities, they  
3 are carried out on a wide range of soil types, site  
4 types, stand types and so on, we have heard that  
5 evidence, and when carried out on this variety of sites  
6 and stands, the four activities, although they have  
7 common names, are carried out differently and they  
8 result in different environmental effects.

9 Therefore, Mr. Chairman, we are talking  
10 about private sector activities that are quite diverse  
11 across the area of the undertaking in terms of how they  
12 are carried out and in terms of the impacts that may  
13 result. And while these activities are different, the  
14 Ministry's evidence I believe emphasized that these  
15 activities are essentially inter-related and need to be  
16 carried out and planned sequentially.

17 Mr. Chairman, you may recall that the  
18 Ministry evidence has repeatedly spoken of  
19 silvicultural packages. Now, these packages, Mr.  
20 Chairman, contain or consist of discreet activities  
21 that are carried out, as I say, differently on  
22 different soil types, stand types and so on. What  
23 integrates these disparate activities, Mr. Chairman, is  
24 the planning process. And indeed the inter-related  
25 nature of those activities clearly suggests the need



1       for a proper planning process.

2                   Mr. Chairman, it has been our position  
3       since day one of this hearing that these private sector  
4       activities, as they are carried out in the area of the  
5       undertaking, lack the commonality to justify the Class  
6       EA approach. There is also a lack of commonality in  
7       terms of environmental impacts of these private sector  
8       activities. What provides the commonality, in our  
9       view, for this undertaking is the planning process;  
10      that is, the undertaking. That is what unifies or ties  
11      together these disparate private sector activities and  
12      that is why we say the Ministry of necessity must be  
13      seeking approval for the planning process described in  
14      the Class EA. Mr. Chairman, I would submit that I am  
15      supported in that submission by the draft terms and  
16      conditions submitted by the Ministry.

17                   Now, last week Ms. Seaborn referred to  
18      the fact that the very first term and condition relates  
19      to planning, and in fact most of the terms and  
20      conditions in this document, Exhibit 700, are what I  
21      would characterize as planning terms and conditions.

22                   But I would also point out, Mr. Chairman,  
23      that many of these terms and conditions do not,  
24      strictly speaking, relate to the activities of access,  
25      harvest, renewal and maintenance, and here I'm

1 referring to the public participation terms and  
2 conditions, the bump-up and amendment provisions, and  
3 so on. I submit that those kinds of provisions are  
4 implicit recognition by the proponent that we're here  
5 to do more than talk about the four activities in the  
6 abstract.

7 I don't intend to read any of the terms  
8 and conditions, but I would refer you to term and  
9 condition 59. This was referred to earlier this  
10 morning. As this term was amended last week, it now  
11 reads:

12 "Amendments to the approval for the  
13 undertaking during the term of this  
14 approval may be required in the following  
15 circumstances."

16 And the first circumstance in paragraph 1  
17 is:

18 "Correction, clarification or  
19 improvement of the timber management  
20 planning process."

21 Mr. Chairman, that term and condition is  
22 inconsistent with the Ministry's position that planning  
23 is not the undertaking.

24 THE CHAIRMAN: I think the Ministry,  
25 through Mr. Freidin, this morning indicated that they

1 want to amend that condition--

2 MR. LINDGREN: Further.

3 THE CHAIRMAN: --to get rid of that  
4 inconsistency.

5 MR. LINDGREN: Okay.

6 Mr. Chairman, we are here to scrutinize  
7 how this Ministry proposes to plan and regulate the  
8 four activities that are by and large carried out by  
9 private companies in the area of the undertaking. We  
10 are here -- as I have indicated, Mr. Chairman, these  
11 activities are carried out by the private sector and to  
12 this point we have not seen much in terms of evidence  
13 relating to the actual on-the-ground impacts of these  
14 activities across the area of the undertaking.

15 If the Ministry position is that the  
16 undertaking is the actual on-the-ground activities,  
17 then we say: Where is the actual on-the-ground  
18 environmental impact analysis? Mr. Chairman, it has  
19 always been my understanding that that kind of analysis  
20 was believed to be unnecessary by the proponent because  
21 we are looking at the planning process at large and not  
22 necessarily any particular activity in any particular  
23 portion of the area of the undertaking.

24 Mr. Chairman, the mere fact that the  
25 Ministry has put forward planning terms and conditions

1 does not settle the jurisdictional question of: What  
2 is the undertaking. It does not settle the question,  
3 Mr. Chairman, because the Ministry cannot confer  
4 jurisdiction on the Board where none may exist by  
5 simply submitting terms and conditions it's prepared to  
6 live with, and let me explain that.

7                   The crux of the matter is this, Mr.  
8 Chairman: If the undertaking is not the planning  
9 process, how can the Board impose terms and conditions  
10 related to the planning process. It's as simple as  
11 that. This is a fundamentally important jurisdictional  
12 question, Mr. Chairman, and in this respect I do agree  
13 with my friend Mr. Cassidy; it's not simply an  
14 evidentiary matter, it is jurisdictional. It's not a  
15 mere semantic exercise, Mr. Chairman, it is extremely  
16 important, it's fundamental to the Board's  
17 determination.

18                   Now, last week Mr. Freidin asked you:  
19 What are the practical implications of this issue, and  
20 that discussion, Mr. Chairman, is found in Volume 171,  
21 pages 30375 and following. I won't read that  
22 discussion, Mr. Chairman, but in our view the practical  
23 implications of this issue are precisely as you  
24 describe them.

25                   If the undertaking is the planning



1 process, and by that I mean the planning process at  
2 large includes or subsumes any licensing regimes  
3 necessary to carry out or implement the plans or  
4 planning, if the undertaking is the planning process,  
5 then certainly the parties can cross-examine and lead  
6 evidence on alternative planning methods or  
7 alternatives to that undertaking. More importantly,  
8 the Board may impose terms and conditions setting out  
9 the form and content of the planning process if it is  
10 the undertaking.

11 On the other hand, if the undertaking is  
12 the four activities only, then the parties may well be  
13 precluded from cross-examining or leading evidence on  
14 alternative planning regimes since these regimes may  
15 not necessarily be alternative methods of carrying out  
16 the undertaking in that they don't deal specifically  
17 with the four activities. And, more importantly, if  
18 that is the Board's ruling, if the Board finds that the  
19 undertaking is the activities only, then the Board I  
20 think may be precluded from scrutinizing the planning  
21 process or from imposing even reasonable terms and  
22 conditions related to the planning process because it  
23 is not the undertaking.

24 And Mr. Freidin last week I believe  
25 indicated that he would have no objections if the

1 parties want to cross-examine or lead evidence on  
2 alternate planning regimes and, in fact, I believe he  
3 said he expected that and I believe the Board also  
4 indicated that it expected the parties to do so as  
5 well.

6 Now, Mr. Chairman, Mr. Freidin's offer  
7 was certainly very generous but, with respect, it  
8 misses the point of this discussion and it does not  
9 assist the Board in determining what the undertaking  
10 is. In our view, we should be able to cross-examine  
11 and lead evidence on alternate planning regimes, not  
12 because Mr. Freidin has graciously allowed us to do it,  
13 but for the substantive reason that the undertaking is  
14 planning and that alternative means or methods of  
15 planning are certainly relevant and necessary for this  
16 Board's determination of the issues.

17 And on this point, Mr. Chairman, I should  
18 say that we disagree with Mr. Campbell's earlier  
19 submission this morning or this afternoon that the  
20 MNR's current approach, or the current formulation of  
21 the EA somehow jettisons the need to decide what is an  
22 alternative and what is an alternative method. I think  
23 that question and that issue is still squarely before  
24 the Board however you slice it.

25 MR. CAMPBELL: Well, Mr. Chairman, with

1       respect, that was not my submission. What I said was  
2       that if the planning process was part of the  
3       undertaking, then you had a whole loop of analysis  
4       based on the Court of Appeal decision that you had to  
5       go through. I specifically said no such thing as Mr.  
6       Lindgren is suggesting.

7                   MR. LINDGREN: Well, that was my  
8       interpretation of the submission that was made this  
9       morning and, of course, we will have to check the  
10      transcript when it's available.

11                   In any event, Mr. Chairman, Mr. Campbell  
12      went on to indicate that in his view it is unnecessary  
13      for this Board to determine this issue at this time, it  
14      can do so -- or it can decide the exemption or  
15      licensing motion without making that determination. I  
16      disagree with that. The answer to this question is  
17      fundamentally important for a number of reasons and we  
18      need to do to know it now as opposed to later.

19                   MR. CAMPBELL: I disagree with that.

20                   THE CHAIRMAN: Well, I think that the  
21      Board raised that point with Mr. Cassidy as to what  
22      link there may be between Section 10 and what  
23      constitutes the undertaking, if the interpretation of  
24      Mr. Cassidy with respect to how you define undertaking  
25      has to relate back to Section 1(o) of the Act.

1                   MR. LINDGREN: That is one link and, Mr.  
2           Chairman, I agree that is one reason why the Board has  
3           to make this determination now. But there are other  
4           reasons, Mr. Chairman, not the least of which is the  
5           fact that we are now on the verge of cross-examination  
6           or further cross-examination on Panel 17.

7                   What the undertaking is will certainly  
8           determine what the scope of cross-examination can be or  
9           should be. But I would point out, Mr. Chairman, that  
10          the issue of what is the undertaking is also important  
11          beyond Panel 17. It's important to the parties who are  
12          now drafting terms and conditions, it's important to  
13          the parties who are preparing for the negotiation  
14          sessions next month.

15                   Finally, and perhaps most importantly,  
16          this question must be answered because it's important  
17          and relevant to the Board's jurisdiction to assess this  
18          Class EA and to decide whether or not approval should  
19          be given or approval should be given subject to terms  
20          and conditions. I think it's absolutely necessary for  
21          a ruling on this issue as soon as possible. I would  
22          also point out that the answer to this question is  
23          important not only for this hearing but in the larger  
24          context of the overall EA process in this province, Mr.  
25          Chairman.



1 I will briefly go through these  
2 submissions and attempt to wind up this submission.

3 If this Board finds that this proponent  
4 through this Class EA is seeking approval for a set of  
5 essentially private sector activities, then we submit  
6 that the entire object and intent of the Environmental  
7 Assessment Act has been undermined and let me explain  
8 that. In our view, the present scheme of the Act is  
9 very clear, all public sector undertakings are subject  
10 to the Act unless exempted, and all private sector  
11 activities are not caught unless designated.

12 And I would like to pause here and  
13 perhaps pick up briefly on a comment made by Mr.  
14 Freidin this morning. He seems to read into the Act a  
15 requirement that these undertakings result in  
16 significant environmental impact. That is not, in the  
17 Environmental Assessment Act; all public sector  
18 activities are in, unless exempted. There is no  
19 further requirement that there be significant  
20 environmental impact; that is what the environmental  
21 assessment process is designed to determine.

22 And, in any event, the scheme of the Act,  
23 as I have just set out, is clearly evident in Section  
24 3(a) and 3(b) of the legislation. And in the context  
25 of that section, Mr. Chairman, let me point out that in

1       this proceeding the MNR exemption order does not speak  
2       of the four activities; similarly no private sector  
3       activity by private forestry companies have been  
4       designated to date; and, finally, the proponent has  
5       stated it is in fact seeking approval for the four  
6       activities, these four activities are not by and large  
7       carried out by the proponent.

8                   In light of these facts, Mr. Chairman, we  
9       submit that the Ministry's position is clearly  
10      untenable. As a matter of law, how can a proponent  
11      receive approval for activities that it does not carry  
12      out.

13                   Now, this morning, Mr. Chairman, Mr.  
14      Campbell raised the example of waste management, waste  
15      management planning. I think it's a good example and I  
16      would like to explore that one a little further.

17                   In the general area of waste management,  
18      the Ministry of the Environment does have the general  
19      regulatory authority over waste disposal sites and  
20      waste disposal systems. Notwithstanding that fact, Mr.  
21      Chairman, how could the Ministry of the Environment  
22      seek and receive approval for waste disposal operations  
23      such as landfills or EFWs that are carried out by the  
24      private sector. I think, Mr. Chairman, the short  
25      answer is clear and obvious; the short answer is no,

1       they can not seek that kind of approval.

2                       And that is precisely what is being  
3       attempted in this case, Mr. Chairman, if the Ministry's  
4       position is upheld. In our view, the Act was never  
5       intended to provide a blanket approval for an entire  
6       industry under the pretext that a public agency somehow  
7       carries out those activities or that that agent somehow  
8       is responsible for the conduct of those activities.

9                       To hold that this undertaking is the four  
10      activities only, Mr. Chairman, would in our view  
11      constitute a clear and flagrant abuse or misuse of this  
12      statute. In other words, if the Board rules that the  
13      undertaking is only the four activities and if the  
14      Board decides to grant approval to proceed then, in our  
15      view, not only would a public sector proponent be  
16      getting approval for private sector activities - which  
17      I submit can't be done - but the approval would  
18      essentially apply to an infinite number of unknown and  
19      unnamed class of private sector companies which have  
20      not been designated, which are not before this Board as  
21      the proponent.

22                      If this is not a subversion of the Act,  
23      Mr. Chairman, then nothing is in our view.

24                      We submit that if this is the MNR  
25      position, then it is an attempt to camouflage one of

1       the perhaps most contentious land use planning issues  
2       and it is an attempt to gain or obtain approval for  
3       private sector activities through the back door. That  
4       cannot be countenanced by this Board, Mr. Chairman,  
5       that position must be rejected in clear and unequivocal  
6       language.

7                       Let me conclude, Mr. Chairman, by  
8       reminding the Board that the exemption order in this  
9       case, Exhibit 993, speaks of forest management and,  
10      again without revisiting that whole issue of the  
11      distinction between forest management and timber  
12      management, in our view, the Ministry has whittled  
13      whatever forest management means down to timber  
14      management and now the Ministry is further whittling at  
15      timber management to simply the four activities.

16                     Mr. Chairman, this has to stop and it has  
17      to stop for the simple reason that the four activities  
18      are not timber management. Management, as I've said  
19      before, is the planning and implementation of those  
20      activities; and therefore, in our view, the Ministry  
21      must be seeking approval for the planning process.  
22      That is what this undertaking is and we urge the Board  
23      to so find.

24                     Now, I mentioned earlier I would speak  
25      briefly to the Ontario Hydro case. We believe that



1       such a finding; i.e., that the undertaking is a  
2       planning process, we believe that that finding would  
3       not amount to amending the undertaking or the EA  
4       against the wishes of the proponent, as was discussed  
5       in the Hydro case.

6                       In our submission, this Class EA  
7       indicates on its face that the common planning process  
8       is what this undertaking is all about. That is the  
9       MNR's justification for the Class EA approach, and that  
10      has been the Ministry's justification for not looking  
11      at the actual on-the-ground impacts of the four  
12      activities throughout the area of the undertaking.

13                     Finally, Mr. Chairman, as you mentioned  
14      last week, it is incumbent upon this proponent to tell  
15      us and to tell the Board precisely what is the  
16      undertaking set out in the Class EA. We've heard Mr.  
17      Freidin's submissions on that, but unfortunately the  
18      Class EA does not set out the undertaking with clarity  
19      and that's why we are having this very discussion.  
20      And I would suggest that this lack of clarity has  
21      perhaps misled some parties as to what is before the  
22      Board for approval.

23                     And, Mr. Chairman, notwithstanding Mr.  
24      Freidin's submissions, we say that it is open to this  
25      Board to find that the Class EA consists of a proposed

1 planning process for the four activities. This finding  
2 can be based on the Class EA itself and on the oral and  
3 documentary evidence that has been led by this Ministry  
4 to this point.

5 I was going to refer to the Board's  
6 jurisprudence on the evolving nature of the EA, I don't  
7 think that's necessary and that's self-evident. But,  
8 Mr. Chairman, our bottom line here is that this  
9 undertaking is the planning process; to hold otherwise,  
10 Mr. Chairman, would jeopardize the somewhat already  
11 tenuous justification for this Class EA under Section  
12 1(o), the definition of undertaking and, more  
13 importantly, it would amount to a subversion of the  
14 Act.

15 Those are my submissions, Mr. Chairman.

16 THE CHAIRMAN: Thank you. I think we  
17 will take a break for 20 minutes.

18 Mr. Colborne, are you prepared to go next  
19 after the break?

20 MR. COLBORNE: Mr. Chairman, I was going  
21 to be about three minutes.

22 THE CHAIRMAN: Oh, okay. Why don't we  
23 deal with you before the break.

24 MR. COLBORNE: I thank you for that, Mr.  
25 Chairman.

1                   I have listened carefully to all of the  
2                   argument and I have reviewed the transcript and the  
3                   argument from last week, and I have sat here agreeing  
4                   and disagreeing with various things, but when all is  
5                   said and done, I have almost nothing to add to the  
6                   submissions that I made in the motion as it was first  
7                   defined before the Board.

8                   And I realize, of course, that it evolved  
9                   somewhat and now we are focusing on an issue that might  
10                  be defined somewhat differently than it was at first  
11                  thought, but I would simply ask you to consider the  
12                  submissions that I made on jurisdiction in that initial  
13                  argument and, to a lesser extent, with the points I  
14                  made concerning evidence. I am not going to repeat  
15                  them now, but I would just like to perhaps put them in  
16                  two propositions.

17                  With respect to, let me call it evidence,  
18                  I want to say that I agree with Mr. Campbell, to the  
19                  extent that the very broad questions now before the  
20                  Board include what might or might not be proper  
21                  evidence or proper cross-examination, I agree with him  
22                  that that can't be defined in advance and in the  
23                  abstract. You need something before you.

24                  Secondly, to the extent that these broad  
25                  issues have to do with what constitutes the

1       undertaking, then I agree generally with Mr. Lindgren's  
2       submissions, at least in terms of the conclusion, that  
3       the undertaking is the planning process or at least  
4       includes it -- at the very least includes it.

5                       And I have only one additional reason  
6       which may not have been put forward by the other  
7       parties or may have just been alluded to which I would  
8       like to stress. I think there is a danger of getting  
9       caught, hooked perhaps by one sentence which appears in  
10      the Ontario Hydro case. Now, that's the sentence that  
11      we keep referring to again and again. It is at page 13  
12      of the authorities book that I filed. It says:

13                      "Only the proponent describes the  
14                      undertaking proposed."

15                      Now, my only contribution in addition to  
16      what has already been said about that is that that  
17      doesn't say, nor was it addressed in that case, whether  
18      the proponent can define and redefine as a process is  
19      underway what the undertaking is, otherwise we would be  
20      engaging in a self-assessment exercise, I mentioned  
21      that before, but possibly more seriously we would be  
22      substituting form for reality.

23                      We have the reality of what is going on  
24      in the forest, we have the reality of what the Ministry  
25      does, we have the reality of a year and a half of



1 evidence, let's not substitute for that reality some  
2 strained and inappropriate form derived from one  
3 sentence in a court decision that really did not have  
4 this type of situation before it.

5 Those are my submissions.

6 THE CHAIRMAN: Okay. Mr. Colborne, I  
7 just want to go one step further. Do you have a  
8 position on the application of Section 10 of the  
9 regulation as applied to Section 9 if in fact the  
10 planning process were defined as part of the  
11 undertaking with respect to licensing regimes?

12 I think you have been here to hear the  
13 arguments today, particularly Mr. Cassidy's  
14 presentation.

15 MR. COLBORNE: I agree with Mr. Cassidy  
16 to the extent that, having heard all of the submissions  
17 and looked at that regulation again, that 10 is not  
18 there merely to qualify 9, 10 is there generally I  
19 think to say that: If there is an exemption  
20 somewhere - it doesn't matter where it is - but  
21 particularly in this regulation, if you can find an  
22 exemption, but something has become part of an  
23 undertaking - it doesn't give us much guidance as to  
24 how that happens or any - but once it has become part  
25 of an undertaking or an undertaking itself, then the

1 Act applies.

2 THE CHAIRMAN: Right. Which means that  
3 the exemption that previously existed is gone?

4 MR. COLBORNE: Yes.

5 THE CHAIRMAN: Thank you. Okay. Ladies  
6 and gentlemen, I think we will take 20 minutes at this  
7 time and then come back to--

8 MR. FREIDIN: The Ministry of the  
9 Environment and then...

10 THE CHAIRMAN: --hear from Mr. Campbell  
11 and you, Mr. Freidin. Thank you.

12 MS. BLASTORAH: How long a break, Mr.  
13 Chairman?

14 THE CHAIRMAN: 20.

15 ---Recess taken at 3:35 p.m.

16 ---On resuming at 4:15 p.m.

17 THE CHAIRMAN: Thank you. Be seated,  
18 please. Excuse us one moment, Mr. Campbell.

19 MR. CAMPBELL: That's fine.

20 ---Discussion off the record

21 THE CHAIRMAN: Okay. Ladies and  
22 gentlemen, we have just been having a brief discussion  
23 over the Board's concern as to continuing with the  
24 cross-examination of the panel in the absence of a  
25 ruling on this motion and the collateral issues that

1 have been raised, and we are thinking of the  
2 possibility of finishing off with the submissions today  
3 and spending tonight and tomorrow to finalize our  
4 ruling in connection with this entire motion and  
5 allowing the parties to prepare for Thursday, if they  
6 want, for their statements of issue or anything else  
7 that they might have to do, and continuing on with Mr.  
8 Hanna's motion on Thursday.

9 We are a little concerned about backing  
10 up two important motions, the Thursday one on top of  
11 this one, without having issued this one. We do not  
12 feel that we can appropriately delineate the bounds of  
13 the cross-examination without in fact rendering a  
14 decision on some aspects of the motion before us over  
15 the last two or three days.

16 We have heard another full day, or we  
17 will have heard another full day of submissions on this  
18 motion, it is a lot of material to cover, we end up  
19 hearing evidence tomorrow and the other motion on  
20 Thursday and then going back to Toronto. The Board is  
21 afraid that we won't get to rendering a decision on  
22 this motion before we come back again next week, and  
23 problems are going to arise, we are sure, in terms of  
24 the scope of the examination with 17.

25 So we understand, Mr. Cassidy, I think it

1       would be you that would be impacted probably the most  
2       or Mr. Cosman.

3                   MR. CASSIDY: My throat is feeling a  
4       little less sore at the moment. I am not going to say  
5       I am going to get hanged if we don't start on February  
6       the 5th, but it does cause me some concern, Mr.  
7       Chairman.

8                   THE CHAIRMAN: Well, I know it does, but  
9       you can understand the concern of the Board.

10                   I mean, it started out as a relatively  
11       innocuous motion, it was expanded perhaps by the way in  
12       which Mr. Freidin put it forward in terms of the  
13       wording of his motion, and it has expanded further into  
14       some issues dealing with some very fundamental  
15       questions concerning the Class EA itself.

16                   We've heard full argument from everyone.  
17       We feel it is incumbent upon the Board to render a  
18       decision in a timely fashion since, in our opinion,  
19       some aspects of the cross-examination of Panel 17  
20       depend on it.

21                   MR. CASSIDY: I understand, Mr. Chairman.

22                   THE CHAIRMAN: And I think we could do  
23       it, if we spent tonight and tomorrow to do it, we would  
24       be able to probably issue the ruling some time  
25       tomorrow.



1 MS. BLASTORAH: Mr. Chairman, I just rise  
2 on one point that I had forgotten about. Mr. Duncanson  
3 has advised me he is not available after next week, so  
4 I am just wondering if we could get a projection - I  
5 know it is difficult - but if we could get a projection  
6 from the parties as to how long they anticipate their  
7 submissions will be on Thursday, it would give some  
8 idea whether the cross-examination is likely to extend  
9 beyond the three days of next week and whether that  
10 would even be a problem.

11 THE CHAIRMAN: Well, the Thursday's  
12 motion, unless it turns out to be an animal of a  
13 different specie, probably won't impact on the  
14 cross-examination for Panel 17.

15 MS. BLASTORAH: No, except in terms of  
16 time, Mr. Chairman.

17 THE CHAIRMAN: Right.

18 MS. BLASTORAH: I am thinking if we have  
19 that Thursday and by some chance it runs into Monday,  
20 we have even less time.

21 THE CHAIRMAN: Well, we are trying to  
22 ascertain from Mr. Hanna how long he will be. Perhaps  
23 some of the other parties could indicate how long they  
24 will be, but I suppose to some extent they are  
25 dependent on what Mr. Hanna has to say. You do have

1 his Notice of Motion and the supporting material that  
2 he is going to rely on.

3 MS. BLASTORAH: The other possibility I  
4 raise, and I appreciate that notice has gone out on  
5 that motion, but I suppose a potential would be to put  
6 that motion over because it is not something that has  
7 to be dealt with before the cross-examination on Panel  
8 17, the purpose motion.

9 So if it were a problem with finishing  
10 this panel before the end of next week and Mr.  
11 Duncanson not being available, that might be a  
12 suggestion that would assist.

13 THE CHAIRMAN: Well, we may well be able  
14 do that.

15 MR. FREIDIN: I mean, our witnesses don't  
16 expect to be here on Thursday, but we can certainly  
17 make every effort tonight to find out, to get them back  
18 here for Thursday, and if all the major parties who  
19 would be cross-examining in any event find that  
20 agreeable, maybe that's a way of dealing with it.

21 THE CHAIRMAN: I mean, that wouldn't be a  
22 problem, would it, Mr. Cosman, for you to  
23 cross-examine -- or Mr. Cassidy?

24 MR. CASSIDY: No, I am ready to  
25 cross-examine on a minute's notice in respect to this

1 panel.

2 MR. MARTEL: You can start now.

3 THE CHAIRMAN: Well, maybe that would be  
4 a better solution, although I am sure Mr. Hanna has  
5 made arrangements to be front and centre on Thursday.

6 MR. FREIDIN: We just can't make a  
7 commitment. We have to check with our witnesses, they  
8 may have made plans that they can't get out of now.

9 THE CHAIRMAN: All right. Can we put it  
10 this way: Could we leave it to the parties to try and  
11 work it out amongst themselves as to whether we should  
12 be starting the cross-examinations on Thursday or  
13 Monday; but, in any event, we will take tomorrow to  
14 finalize the ruling on the submissions made in  
15 connection with this motion.

16 We would do the scoping tomorrow that's  
17 scheduled for tomorrow in any event, we are going to do  
18 that.

19 MR. FREIDIN: Mr. Chairman, another  
20 comment I would like to make - and I think your  
21 suggestion is a good one, that the parties try to  
22 figure out what are we going to do on Thursday, whether  
23 it will be the motion or whether it will be evidence -  
24 in light of Mr. Cassidy's predicament and earnest  
25 desire to start with his witnesses on the 5th, I would

1 ask the Board to take a look at their calendars - and  
2 we don't have to deal with this right now - and  
3 determine whether they are free or, if they are not,  
4 whether they can free themselves up, and counsel should  
5 do the same thing, so that we can in fact sit more days  
6 between now and February the 5th if necessary in order  
7 to finish not only this panel, but the clearcut  
8 exercise so we do in fact finish our case by the end of  
9 the week prior to the 5th of February.

10 So really what I am suggesting, for  
11 instance, if we look at the week of January the 29th we  
12 have got three days: Tuesday, Wednesday, Thursday, I  
13 am suggesting if we have to, perhaps we should  
14 tentatively take a look at our calendars and discuss  
15 before the end of the week whether we can free up those  
16 days, the Monday and the Friday, and make them  
17 available for hearing if in fact it is necessary to  
18 finish our case before February the 5th.

19 As I say, I don't think we can decide  
20 that now. You people may have commitments, other  
21 people may have commitments and I think we should all  
22 take a look at that.

23 THE CHAIRMAN: Well, we certainly have  
24 some commitments, whether they can be changed or not is  
25 hard to say at this point. But, again, there is no



1 expectation that we may not finish either in time to  
2 start February 5th.

3 MR. FREIDIN: That's right. Well, all I  
4 can tell you is it looks like the clearcut evidence and  
5 the evidence of Mr. Bisschop will take one half of a  
6 day to a day, let's say a day.

7 Now, I don't know how long people intend  
8 to cross-examine. We have now got the witness  
9 statement out, people might be able to give us some  
10 idea of how long they believe -- without hearing the  
11 evidence, how long they might be and find out whether  
12 we have really got a problem. It is something else we  
13 could canvass perhaps before we adjourn today as well.

14 And I am advised the statement of issues  
15 are due on the clearcut tomorrow. That may give us  
16 some further idea, but counsel who have submitted them  
17 might be able to give us some indication either now or  
18 at the end of the day.

19 THE CHAIRMAN: Well, it may be difficult  
20 trying to fit in some extra days. There is a  
21 possibility of Friday the 2nd of February as an extra  
22 day in Toronto. The Board, this panel, has to be there  
23 on the Thursday night in Toronto coming back from here,  
24 if we needed an extra day. We are probably willing to  
25 sit later hours if necessary for the days we are

1 sitting.

2 MR. FREIDIN: And next week? I know that  
3 there are some pretty important matters being dealt  
4 with by many of the witnesses on this panel on January  
5 the 25th, but just again, is the Board indicating that  
6 it is not --

7 THE CHAIRMAN: No, the 25th and the 26th  
8 are out.

9 MR. FREIDIN: All right.

10 THE CHAIRMAN: And they were excluded for  
11 previous commitments that were made some time ago.

12 MS. BLASTORAH: Mr. Chairman, would  
13 longer sitting hours be a possibility?

14 THE CHAIRMAN: Well, yes. I mean, longer  
15 sitting hours would certainly be a possibility if it  
16 means getting finished in time. We are all up here  
17 anyways, we try and sit, as you are probably aware,  
18 fairly lengthy hours as it is. We can probably take a  
19 bit more, if the witnesses and counsel can, but maybe  
20 you want to say less.

21 MR. FREIDIN: That sounds like a great  
22 idea.

23 MR. MARTEL: That's a possibility.

24 THE CHAIRMAN: I am sure that's not  
25 something ever contemplated by counsel before, but it

1 is within the realm of possibility, I suppose.

2 Anyway, I think we will proceed on that  
3 basis, that we won't hear evidence tomorrow and we will  
4 conclude today with the submissions of Mr. Campbell and  
5 then Mr. Freidin.

6 Okay. One more possibility, Mr. Freidin,  
7 is it possible for the panel to commence  
8 cross-examination tomorrow afternoon?

9 MR. FREIDIN: Sure.

10 THE CHAIRMAN: Okay. We will endeavor to  
11 do the writing of this ruling tonight and tomorrow  
12 morning and maybe the physical production and  
13 polishing, et cetera, et cetera, can occur throughout  
14 the breaks in the afternoon, and then we will issue it  
15 at some time before or after the scoping session at the  
16 end of the day, and that way we will get in a half  
17 day's worth of cross-examination in any event.

18 MR. CASSIDY: I don't mean to throw a  
19 ring out --

20 THE CHAIRMAN: You will want to see the  
21 ruling?

22 MR. CASSIDY: Yes. I can't see say  
23 whether or not unless I see the ruling unfortunately,  
24 Mr. Chairman.

25 ---Discussion off the record

1                   THE CHAIRMAN: All right. Look, we want  
2           to do and give it the time we think this particular  
3           matter deserves, and I don't think the Board wants to  
4           place itself into a position of having to rush through  
5           it to meet a particular deadline.

6                   So that I think what we are going to end  
7           up doing is not hear evidence tomorrow, we are going to  
8           take tonight and tomorrow to finalize the ruling, you  
9           will have it in front of you, Mr. Cassidy, before you  
10          have to commence examination.

11                  There are still six days left and we hope  
12          that the parties can just structure their examinations  
13          to allow you to finish in time, and we will sit longer  
14          hours if necessary to accommodate that.

15                  We just had a note dropped to us that Mr.  
16          Hanna estimates on Thursday he will be approximately  
17          two hours for his motion. I would suggest that when  
18          everyone else gets their shot at it that that will  
19          probably utilize most of Thursday.

20                  MR. FREIDIN: Well, we may convince him  
21          that we call evidence and he should put his motion off  
22          until later.

23                  THE CHAIRMAN: Well, yes, that's if he  
24          were going to present it on...

25                  MR. FREIDIN: Or convince him not to



1 present it at all.

2 THE CHAIRMAN: If you can do that --

3 MR. FREIDIN: We are tempted to do that,  
4 Mr. Chairman, a number of us.

5 THE CHAIRMAN: Okay. We have got an  
6 indication that Mr. Hanna would not be shattered if he  
7 didn't have to argue his motion on Thursday.

8 MR. FREIDIN: You have got that?

9 THE CHAIRMAN: We have supposedly through  
10 Ms. Devaul have that indication. So that we are going  
11 to leave it to counsel to make the necessary  
12 arrangements so that we can hear evidence on Thursday.

13 MR. CASSIDY: When you say hear evidence,  
14 you mean cross-examination on Panel 17?

15 THE CHAIRMAN: That's right. Start  
16 cross-examination on 17 Thursday morning and,  
17 therefore, we will get in most of that day. We think  
18 it is probably appropriate that we can put off this  
19 motion because it doesn't really impact on 17, this  
20 particular one, and we will spend tomorrow to get out  
21 this motion and the ruling on it. Okay.

22 MR. MARTEL: We will see the  
23 self-discipline now.

24 MS. BLASTORAH: I forgot what we were  
25 talking about.

1 THE CHAIRMAN: We are talking about you  
2 sorting it all out so you finish by February the 5th.

3 MS. BLASTORAH: No, I meant before the  
4 break.

5 THE CHAIRMAN: Oh, okay.

6 MR. CAMPBELL: I will take a few minutes  
7 to outline it to everyone.

8 THE CHAIRMAN: Mr. Campbell, we are up to  
9 you now.

10 MR. CAMPBELL: I think so.

11 Mr. Chairman, first, Mr. Lindgren made  
12 considerable mention to excerpts of -- yes, it was the  
13 January, 1977 EA Update. I have no idea how the volume  
14 and number system works, but I understand the date. So  
15 the January, '77 one, I believe it should be given the  
16 next exhibit number. I intend to refer to it again.

17 THE CHAIRMAN: It already is 993.

18 MR. CAMPBELL: No, that was a different  
19 one; was it not?

20 MR. LINDGREN: Mr. Chairman, Exhibit 993  
21 is the exemption order. I believe the EA Update has  
22 not been given an exhibit number.

23 MR. CAMPBELL: The exemption order -- I  
24 have Exhibit 993 as being the exemption order.

25 MS. BLASTORAH: Yes, and 994 is January,

1 '81...

2 MR. CAMPBELL: 994 is the January, '81  
3 Interim Guideline I believe, and then 995 would be the  
4 January, 1977 EA Update.

5 THE CHAIRMAN: Okay, sorry.

6 ---EXHIBIT NO. 995: EA Update dated January, 1977.

7 MR. CAMPBELL: Mr. Chairman, in an effort  
8 to be brief, I am just going to refer to a couple of  
9 the submissions with respect to this EA Update.

10 Mr. Lindgren stated or asserted -- this  
11 is on Mr. Martel's clock.

12 THE CHAIRMAN: We have these numbers  
13 messed up a little bit. So 993 is the exemption order?

14 MR. CAMPBELL: Yes.

15 THE CHAIRMAN: 11-89?

16 MR. FREIDIN: Which is Ontario Regulation  
17 2 for '85.

18 MS. BLASTORAH: I think 994, Mr.  
19 Chairman, was actually the General Guidelines for  
20 Preparation of Environmental Assessments.

21 THE CHAIRMAN: Right. And 995 is going  
22 to be the January, '77 EA Update?

23 MR. CAMPBELL: Exactly.

24 MR. FREIDIN: Mr. Chairman, if we are  
25 going to mark the January, 1977 EA Update as an

1 exhibit, then perhaps we should also mark as an exhibit  
2 the October, 1976 document which I relied on in my  
3 submission.

4 THE CHAIRMAN: That is just part of the  
5 document; is it not? I guess they are all parts of the  
6 document.

7 MR. FREIDIN: If we are going to start  
8 marking as exhibits documents that were submitted on  
9 the motion, then perhaps we should be sure we introduce  
10 all of them. And that would really mean you would want  
11 to add two, the October, 1976 Update and Ontario  
12 Regulation 205-87.

13 THE CHAIRMAN: 205-87?

14 MR. FREIDIN: 205-87. I mean, rather  
15 than doing it partway I think we should it all the way  
16 if we are going to start on this, and I like the idea  
17 of getting up there.

18 MR. MARTEL: These are yours; aren't  
19 they?

20 MR. FREIDIN: They are. Pardon me?

21 MR. MARTEL: These last three or four are  
22 yours?

23 MR. FREIDIN: The last two October, 1976  
24 EA Update which will be 996, and Ontario Regulation  
25 205-87 would be 997.



1                   That is all I want to put in at the  
2 present time, Mr. Chairman.

3       ---EXHIBIT NO. 996:   October, 1976 EA Update.

4       ---EXHIBIT NO. 997:   Ontario Regulation 205-87.

5                   THE CHAIRMAN:   Okay.   I suppose all  
6 counsel should be giving some consideration as to the  
7 location and the date for the big event.

8                   MS. BLASTORAH:   It will be a late New  
9 Year's party.

10                  MR. FREIDIN:   We will be well planned,  
11 Mr. Chairman, and only class people will be invited.

12                  MR. CAMPBELL:   Now, as I was saying, Mr.  
13 Chairman, Mr. Lindgren over the course of his  
14 submissions has asserted several times that the  
15 undertaking must be the planning process in relation to  
16 the four activities.   In my submission, the fact that  
17 he asserts it does not make it so.

18                  I point out that he has not dealt with  
19 the argument which we presented on behalf of the  
20 Minister with respect to the three tasks that the Board  
21 has in front of it, he has referred and relied very  
22 heavily on certain statements in the EA Update.   Those  
23 statements - and I will refer you first to page 7 of  
24 Exhibit 995 - those statements generally follow the  
25 wording that he referred to at the bottom of page 7 of

1       that exhibit:

2                        "An environmental assessment can be  
3                        carried out on an individual project or  
4                        for a class of projects. The latter  
5                        would apply to smaller, frequently  
6                        recurring undertakings where a common set  
7                        of procedures for construction and  
8                        implementation can be identified."

9                        All of the other quotes refer to the fact  
10                      that the environmental assessment in a class  
11                      environmental case generally contains a common planning  
12                      procedure or practice. We agree with all of the  
13                      statements that are set out in the EA Update and we  
14                      support and believe that those statements are accurate.

15                      They do not address the issue on this  
16                      motion. Those statements say that the Environmental  
17                      Assessment Document sets out a planning practice or  
18                      planning procedure. The issue before you that has been  
19                      argued today is whether that common planning procedure  
20                      is part of the undertaking.

21                      That is a completely different question  
22                      and, in our submission, Mr. Lindgren can take no  
23                      support for his proposition that those procedures are  
24                      part of the undertaking by pointing to EA Update  
25                      statements which say that the class environmental

1       assessment must set out planning procedures.

2                       Those statements simply do not support  
3       his proposition. There is no reference in the various  
4       statements he has referred to from the various EA  
5       Updates which would indicate that the planning process  
6       is part of the undertaking. They all say simply that  
7       the environmental assessment sets out a planning  
8       process and, in terms of what is before the Board,  
9       those matters are before the Board, in our submission,  
10      quite properly by including the planning procedure as  
11      part of the proposed terms and conditions through which  
12      the undertaking will be carried out.

13                    Towards the end of his submissions then  
14      Mr. Lindgren's analysis seems to be premised on the  
15      basis that the undertaking and the term and conditions  
16      basically have to be the same thing. Again, in our  
17      submission, that is quite an inaccurate  
18      characterization.

19                    The undertaking is the specific thing  
20      that the proponent wants to do, and the terms and  
21      conditions are the thicket of provisions which surround  
22      the undertaking, instruct the proponent how the  
23      undertaking must be carried out, and those are  
24      something quite different from the undertaking itself.

25                    In terms of Mr. Lindgren's argument as to

1 the relationship between the undertaking and the scope  
2 of cross-examination, again it is our submission that  
3 the undertaking alone does not determine the scope of  
4 cross-examination. Parties are quite entitled to  
5 cross-examine on matters which are relevant to the  
6 other two tasks which are before the Board beyond the  
7 approval of the undertaking.

8 The argument in front of you today has  
9 not revolved about how precisely the proponent has  
10 defined the undertaking, that is quite clearly set out  
11 in the document. In our submission, Mr. Lindgren's  
12 submission that it is not clearly set out in the  
13 document is quite wrong; it is clearly stated, it's  
14 short and it's concise and it relates to the four  
15 activities.

16 In our submission, the argument today is  
17 not about whether there is a clear description of what  
18 the proponent calls the undertaking, it's about the  
19 legal effect of that specific description and to  
20 characterize it in any other way is, in our submission,  
21 quite incorrect.

22 MRS. KOVEN: Excuse me, Mr. Campbell.  
23 What did you just say about the legal effect of the  
24 specific description?

25 MR. CAMPBELL: What I was trying to point



1 out was that we disagreed with Mr. Lindgren's  
2 submission that there is not, within the Environmental  
3 Assessment Document, a clear description of the  
4 undertaking. In our submission, it is clearly and  
5 specifically defined, it's a specific part of the EA,  
6 it's short and concise.

7 The argument today, in our submission, is  
8 about the legal effect of that description of the  
9 undertaking which has been set out by the proponent.  
10 That is at the heart of what the argument is about  
11 today. I think to suggest that there is lack of  
12 clarity in that description misstates the issue.

13 Now, Mr. Lindgren attempted to draw some  
14 comfort from the exemption order. The exemption order  
15 predated the submission, all of the Ministry of the  
16 Environment's literature which described how an  
17 environmental assessment should best be prepared makes  
18 it quite clear that the precise nature of the  
19 undertaking for which approval will be sought can  
20 evolve and would be expected to evolve over the  
21 preparation and conduct of the supporting studies for  
22 the environmental assessment, and I don't think it is  
23 appropriate for Mr. Lindgren to say that that process  
24 ought to stop on the basis of the exemption order.

25 We have talked about this before in the

1       hearing. If there is some problem in respect of the  
2       exemption order, it is a problem between the two  
3       ministries and not one for this Board. And Mr.  
4       Freidin's witnesses have addressed why it is the  
5       name -- the operational name of the document changed  
6       over time and I think has taken the position that the  
7       scope of the analysis did not change, even though the  
8       name was changed for clarification purposes. That is  
9       his position.

10                       If when this Board grants an approval  
11       there is some problem that arises out of the use of the  
12       word 'forest management' in the exemption order, in my  
13       submission, that is not a problem for this Board; it is  
14       a problem that will have to be dealt with elsewhere.

15                       Now, I have spoken to all of the EA  
16       Update points.

17                       The other point that Mr. Lindgren raised  
18       is this question of the Ministry of Natural Resources  
19       not being the body that is carrying out the  
20       undertaking. Mr. Lindgren quite fairly referred you to  
21       Section 1(k)(ii) which states that the proponent means  
22       the person who is:

23                       "...the owner or persons having the  
24                       charge, management or control of an  
25                       undertaking."

1                   Now, again, the undertaking has been  
2                   specified by the proponent in this application before  
3                   you and it is quite clear that the Minister of Natural  
4                   Resources has management or control of those activities  
5                   on Crown land. Not only is it quite clear, it is a  
6                   statutory obligation placed on the Minister of Natural  
7                   Resources pursuant to the Crown Timber Act and the  
8                   Public Lands Act.

9                   So that it seems clear to me both that,  
10                  and I urge upon the Board, the view that clearly the  
11                  Minister of Natural Resources is the proper proponent,  
12                  it is required to be a proponent by the definition  
13                  under that section that I have referred you to, and it  
14                  is entirely consistent with all of the other analysis  
15                  that I have presented to you today to adopt that  
16                  interpretation and, as I say, I urge it upon you.

17                  I might just briefly mention this matter  
18                  of the tenuous nature of the Class EA. The Class EA  
19                  has been terminology that has been developed to  
20                  identify applications of a particular type or nature.

21                  My friend, Mr. Lindgren, refers regularly  
22                  to the wording that deals with relatively smaller scale  
23                  or recur frequently, have a generally predictable range  
24                  of effects. I would simply refer the Board on Exhibit  
25                  994, which are the General Guidelines of January, 1981,

1       that that sentence goes on to say, at page 16 under the  
2       heading "Class Undertaking", in about the middle of the  
3       paragraph, the sentence goes on to say that:

4                "They have a generally predictable range  
5                of effects which, though significant  
6                enough to require environmental  
7                assessment, are likely to cause  
8                relatively minor effects in most cases."

9                That statement is qualified generally --  
10       that sort of general description of what had been  
11       normal experience is qualified specifically by the  
12       words: "in most cases."

13               I think it's quite clear that the  
14       application before you is not a case necessarily that  
15       fits into all of the elements of that description.  
16       That is why the words 'in most cases' are there, to  
17       allow for the fact that this approach which, for  
18       convenience, has been characterized as a Class EA  
19       approach, is available in other than situations which  
20       meet every one of the elements of that description in  
21       Exhibit 994.

22               I think that deals with the major points  
23       which I wanted to address, and unless there are any  
24       questions that the Board has on that, those are my  
25       additional submissions.



1 MRS. KOVEN: I have a question, Mr.  
2 Campbell. Going to Section 12 in the EA Act--

3 MR. CAMPBELL: Yes.

4 MRS. KOVEN: --could you just briefly  
5 take me through the point you mentioned earlier in the  
6 discussion about 12(d).

7 MR. CAMPBELL: 12(d) - perhaps I will  
8 just introduce it by saying we take the position that  
9 12(2)(c), (d), (e) outline the three tasks that are  
10 before the Board.

11 With respect to the middle one, 12(d),  
12 what I said was that the wording there is 'whether  
13 approval to proceed with the undertaking in respect of  
14 which the environmental assessment was submitted is  
15 statutory support for the proposition that the  
16 undertaking as submitted by the proponent is what the  
17 proponent is entitled to have an answer to in terms of  
18 an approval'.

19 It's not, 'as submitted and further  
20 refined by the Board during the course of the hearing',  
21 it is 'as submitted'. The document is submitted to the  
22 Minister - the Act requires that- the document contains  
23 a definition of the undertaking, and the Board has the  
24 authority under that section to deal with the approval  
25 as submitted.

1                   There is no suggestion there that would  
2                   support Mr. Lindgren's view that it then becomes open,  
3                   after submission, for everyone else to suggest that the  
4                   proponent really should get approval in relation to  
5                   some other thing or some add-ons to it. It's entitled  
6                   to and the Board is required - the introduction of  
7                   those sections - the Board is required to hold a  
8                   hearing with respect to the approval of the undertaking  
9                   in respect of which the environmental assessment was  
10                  submitted.

11                  And I draw from that support from the  
12                  proposition that the proponent is entitled to an answer  
13                  to whether it can do what it wants to do as set out in  
14                  the application.

15                  MRS. KOVEN: How does that relate to  
16                  point (c) above?

17                  MR. CAMPBELL: Point (c) above. Point  
18                  (c) above:

19                  "The acceptance or amendment and  
20                  acceptance of the environmental  
21                  assessment..." is intended to ensure that  
22                  the Board addresses its mind to the question of whether  
23                  there is an appropriate basis of information upon which  
24                  to base a decision, that in fact the matters which are  
25                  required to be addressed under the Act have been

1       addressed, and that the environmental assessment is  
2       acceptable, and normally the wording that is used in  
3       that context is 'it's acceptable for the purposes of  
4       making a decision', and then a decision is made with  
5       respect to approval and with respect to the imposing of  
6       terms and conditions, if an approval is given under  
7       subsection (d).

8                   THE CHAIRMAN:   Thank you.

9                   MR. CAMPBELL:   Thank you, Mr. Chairman.

10                  THE CHAIRMAN:   Mr. Freidin?

11                  MR. FREIDIN:   Let me begin, Mr. Chairman,  
12       by indicating that I adopt all of the submissions just  
13       made by Mr. Campbell, and I will therefore not repeat  
14       them. I believe he is correct in respect of those  
15       submissions, and that is the reason that I adopt them.

16                  I would like to do three things in my  
17       response: Firstly, I wanted to address two questions  
18       that you asked, Mrs. Koven. I want to deal with the  
19       issue of licensing and the submissions made by Mr.  
20       Cassidy and Mr. Campbell, and then I want to deal with  
21       the submissions of Mr. Lindgren.

22                  The first question that you asked, Mrs.  
23       Koven, and I'm interpreting what you were saying: What  
24       happens if the Board repeatedly over time requires a  
25       certain type of of plan to be prepared, a certain kind

1 of study to be prepared, and what effect does that  
2 have - I think was your question - on what is or what  
3 is not part of the undertaking. That is how I  
4 understand your question.

5 As a matter of law, something can only be  
6 required in the context of an environmental assessment  
7 if there is a requirement that you do something or  
8 provide something which is provided for in the Act.  
9 The fact that the Board or a Board may in the exercise  
10 of its statutory powers in the past always require  
11 something - in the case we have got here by way of  
12 terms and conditions - does not make the submission of  
13 that kind of a plan or that kind of a study something  
14 which is required in law by the statute.

15 That was the distinction that I was  
16 attempting to make at the beginning of my submissions,  
17 indicating that there is a difference between - and I  
18 think this goes along with what Mr. Campbell was  
19 saying - submitting something under the Act and asking  
20 for approval of the undertaking, because that is what  
21 the Act says you must submit and ask for approval for,  
22 and the Board exercising its discretion under 12(2)(e)  
23 to impose terms and conditions which may require a  
24 planning process. But it's not a statutory requirement  
25 that such a planning process be put forward.



1                   The second question that you asked or  
2           comment that you made - I don't remember to whom it  
3           was, I think maybe it was to -- well, I don't remember  
4           to whom it was, maybe Mr. Cassidy - and; that is: Why  
5           would your view be different in terms of the  
6           interpretation of the Act or the regulation than the  
7           one put forward by the Ministry of the Environment who  
8           had responsibility for the Act and probably was  
9           involved in drafting the regulation.

10                   Again, as a matter of law, no more weight  
11           can be given to a submission regarding the  
12           interpretation of an Act or a regulation which is given  
13           by counsel representing the governmental agency which  
14           has responsibility for either administering the Act or  
15           drafting the regulation.

16                   I wish it were otherwise sometimes, Mrs.  
17           Koven. I appeared for 12 years in courts on behalf of  
18           the Ministry of the Attorney General, on many occasions  
19           on administrative judicial reviews and other cases  
20           involving the interpretation of statutes, and I would  
21           like to have been able to tell the court: Give my  
22           submission more weight on how that statute should be  
23           interpreted because I represent the Attorney General  
24           who in fact has responsibility for administering that  
25           statute and whose staff drafted the regulation. The

1 court, if I had made that submission, would have looked  
2 at me and just said: That, Mr. Freidin, is a  
3 proposition of law which has no weight and they would  
4 not have accepted it.

5 So I just respond that, it may seem that  
6 the person or the agency that drafted it might have a  
7 better sense of what it may have meant, but as a matter  
8 of law, I submit that it is inappropriate for you to  
9 give more weight to the submissions of Mr. Campbell  
10 just because his client happens to have had the  
11 administration or the responsibility to administer that  
12 statute.

13 The second matter I want to deal with is  
14 the issue of licensing. Mr. Cassidy's submissions  
15 related to the issue of the exemption of licensing  
16 under the regulation. I adopt the submissions made by  
17 Mr. Cassidy in that regard, again, because in my  
18 submission they were correct.

19 Now, Mr. Campbell made some submissions  
20 regarding the tests which should be applied by the  
21 Board when determining whether certain - I want to get  
22 this correct - whether certain terms and conditions  
23 could be imposed and whether certain evidence to  
24 support those terms and conditions could be entertained  
25 by the Board.

1                   Those submissions by Mr. Campbell were  
2 not made in relation to the issue of whether or not  
3 licensing was exempt, they were made to address the  
4 situation as to what would happen if the Board rules  
5 that licensing is not exempt.

6                   I have considered the submissions made by  
7 Mr. Campbell, Mr. Colborne and others regarding the  
8 general nature of the relief that I have sought in my  
9 Notice of Motion regarding the matter of whether  
10 licensing could be discussed in a situation where the  
11 Board ruled that there was no exemption, and I agree on  
12 reflection with what Mr. Campbell said; and, that is,  
13 that it would be difficult in the abstract to say that  
14 every possible situation or term and condition which  
15 may have some relationship to licensing would be beyond  
16 the power or the jurisdiction of the Board.

17                   I believe that Mr. Campbell is correct  
18 that one would have to make that assessment based on  
19 the term or condition sought and the tests as set out  
20 in Mr. Campbell's submissions.

21                   I'm not saying at the end of the day that  
22 I won't stand up and say that a term and condition  
23 which relates to licensing should not be granted  
24 because it doesn't meet the tests set out by Mr.  
25 Campbell - which are the tests with which I agree - I

1       might very well do that, but for the purpose of my  
2       motion and for the purposes of disposing of this issue  
3       which has been raised regarding licensing, my position  
4       has then changed somewhat, and they are basically that  
5       the issue of licensing is exempt under the regulation  
6       for the reasons that I put forward and the reasons put  
7       forward by Mr. Cassidy, which I have adopted; but, in  
8       the alternative, if you do not agree with those  
9       submissions and you find that licensing is not exempt,  
10      then I believe the issue of licensing and terms and  
11      conditions in relation to same should be dealt with in  
12      the fashion described by Mr. Campbell and in the manner  
13      that I just indicated to you.

14                THE CHAIRMAN:   Could we find that  
15      licensing was not exempt without applying Section 10 in  
16      relation to the undertaking not referring to the  
17      planning process?

18                MR. FREIDIN:    I am sorry, you better run  
19      that one by me again.

20                THE CHAIRMAN:   Can we find that the issue  
21      of licensing is not exempt by reason of Section 10  
22      without holding that the undertaking includes the  
23      planning process in respect of the four activities,  
24      assuming that the planning process includes some aspect  
25      of licensing?



1 MR. FREIDIN: Well, you see, you  
2 introduced this aspect as to whether the planning  
3 process involves some aspect of licensing and that is  
4 the hooker every time you ask the question.

5 Section 10 is exactly -- and I want to  
6 answer the question, but first of all, Mr. Cassidy's  
7 characterization of Section 10 is correct, that all it  
8 says is, when there is a waiver of an exemption in  
9 relation to an undertaking, the Act applies in relation  
10 to that undertaking as defined. I start there.

11 Now, I don't know whether that answers  
12 your question and, if it doesn't, perhaps you could  
13 rephrase your question so that I can answer.

14 THE CHAIRMAN: Well, it would just be  
15 rehearsing everything we have heard all day, because I  
16 think it goes back to: What is the undertaking.

17 MR. FREIDIN: And we go back to the fact  
18 that the proponent has the right to define the  
19 undertaking.

20 If the undertaking as defined was the  
21 subject matter of an exemption by submitting the  
22 environmental assessment or the undertaking for review  
23 under the Act, then that would indicate that the  
24 exemption no longer applies but the Act applies, and we  
25 go through the whole business of whether you complied

1 with the Act. In effect, that is what has happened  
2 with timber management; there was an exemption order,  
3 we have submitted an undertaking, that undertaking was  
4 exempt. Section 10 of the regulation merely says when  
5 you submit an undertaking in relation to an  
6 undertaking -- an environmental assessment in relation  
7 to an undertaking which was exempt, the Act applies,  
8 and look at the last words of Section 10:

9 "...to that undertaking."

10 And all that means is that Section 5(1),  
11 5(2), 5(3) applies; the Board's powers, if it goes to a  
12 Board, are set out in Section 12 and they apply. In  
13 fact the entire Act applies to that undertaking.

14 I think that is probably the best example  
15 I can give you as to the reason for that section, and  
16 those are my submissions as to the intent of that  
17 section. It is no more than that.

18 Now, and I only just repeat, by way of  
19 comment, earlier discussions I made: In order for  
20 there to be a waiver, in relation to what Mr. Cassidy  
21 said, there has got to be an express waiver of that  
22 exemption.

23 Now, dealing with the submissions of Mr.  
24 Lindgren, Mr. Campbell has dealt with some of them. If  
25 I might just take you to the Environmental Assessment

1 Update which has been marked as Exhibit 995, which is  
2 the January, '77 one, Mr. Lindgren referred to three  
3 particular sections of that. One was on page 7 which  
4 Mr. Campbell referred you to and I agree.

5 Mr. Lindgren also referred to page 15,  
6 the first paragraph in relation to Class EA and I think  
7 Mr. Campbell's submissions clearly address that.

8 The other section that Mr. Lindgren  
9 referred to that I would like the Board to refer to is  
10 on page 10. That section deals -- basically starts  
11 back over on page No. 8 and it is in fact listing  
12 projects requiring an environmental assessment, and  
13 then it goes and lists a bunch of ministries, and when  
14 you get to the Ministry of Natural Resources, it says -  
15 and this is the phrase that Mr. Lindgren referred to:

16 "The following projects are included:

17 The activity of implementing..." and I  
18 stress the word implementing,

19 "...plans in connection with forest  
20 management."

21 Forest management has been changed to  
22 timber management for the reasons set out in the  
23 evidence earlier, the change. When it talks about  
24 projects, it says:

25 "The activity of implementing plans..."

1                   And that, in my submission, supports the  
2           proposition that we have made, that this environmental  
3           assessment, an environmental assessment in general  
4           addresses activities which get implemented or get  
5           conducted in the field and which could have potential  
6           environmental impacts; it does not talk about planning  
7           the implementation of timber management, it talks about  
8           the activity of implementing timber management.

9                   The next submission that I would like to  
10          address, Mr. Lindgren in relation to the exemption  
11          order, MNR 11-9, indicated that forest management is  
12          not defined as the four activities in that particular  
13          exemption order.

14                  I adopt what Mr. Campbell said, that that  
15          is a matter or a fact of no consequence to the issue as  
16          to whether the undertaking includes more than what the  
17          proponent has indicated, it does or not. If something  
18          was contemplated - and we have made this submission  
19          before, and I believe the Board has agreed with that  
20          submission, Mr. Chairman - if for some reason there is  
21          something which was contemplated by the exemption order  
22          which is not the subject matter of what the proponent  
23          is seeking approval for here, it may very well be that  
24          in this situation, that if we get approval to carry out  
25          the undertaking as defined we may have something left



1 over for which we do not have approval under the  
2 Environmental Assessment Act.

3 I am not saying that's the case, but in  
4 that hypothetical situation that is a matter for the  
5 Ministry of Natural Resources to worry about and for  
6 the Ministry of the Environment to be concerned about,  
7 but it is not a matter which should be of concern to  
8 the Board. And I say that because I adopt the  
9 submissions made by Mr. Campbell, that the proponent  
10 has clearly set out what it is seeking approval for,  
11 the Board has a clear responsibility to address its  
12 mind to that and, within the context of the Act,  
13 determine whether acceptance and approval to proceed  
14 should be granted.

15 Secondly, Mr. Lindgren indicated that my  
16 submissions were that there is no difference between a  
17 class environmental assessment and an individual  
18 environmental assessment and how can I say there was no  
19 difference. I think that perhaps simplifies my  
20 submission a little bit too much.

21 I said there is only one type of  
22 environmental assessment, those where the planning is  
23 done right down to the last detail and those where it  
24 is not. There is only one kind of environmental  
25 assessment in terms of the Act only contemplates and

1 requires an environmental assessment which complies  
2 with the provisions of Section 5; and, in my  
3 submission, whether you indicate and plan to the level  
4 of detail where you know where every nail is going to  
5 go, or whether you are dealing with a situation like we  
6 have now, where we can't identify the method because we  
7 don't know the exact time and place, the environmental  
8 assessment which is contemplated by the Act in terms of  
9 what has to be complied with under Section 5 is  
10 absolutely no different.

11 So the legal requirement is no different.  
12 There are not, in my respectful submission, two  
13 different types of environmental assessments required  
14 by law. The difference is, as I indicated in my  
15 opening remarks; and, that is, how those two  
16 environmental assessments have historically been dealt  
17 with in terms of whether terms or conditions will or  
18 will not be imposed.

19 I have accepted the submissions made by  
20 Mr. Campbell in response to Mr. Lindgren's suggestion  
21 that the definition of proponent in fact contemplates  
22 and would require the Minister of Natural Resources to  
23 be the proponent in this environmental assessment for  
24 all the reasons that he indicated.

25 If I might, two comments. He said that

1 the Ministry does not carry out the activities, and I  
2 think for the reasons indicated by Mr. Campbell I don't  
3 really -- if you accept his submission, then I won't  
4 have to make these comments, but I will, in case they  
5 are necessary, they may not be a hundred per cent what  
6 Mr. Campbell says - but you should in this case,  
7 in this case.

8 THE CHAIRMAN: On the offhand chance he  
9 could be wrong?

10 MR. CAMPBELL: In this case generally?

11 MR. FREIDIN: No, in this particular  
12 motion, Mr. Campbell.

13 MR. CAMPBELL: Oh, I'm sorry.

14 MR. FREIDIN: Mr. Lindgren said the  
15 Ministry does not carry out these activities; that is  
16 contrary to all the evidence which has been led. The  
17 evidence quite clearly has indicated that the Ministry  
18 through its own staff carry out many of the activities  
19 and not only on Crown management units but on all  
20 forest management units.

21 And I wonder what will happen to the Act,  
22 Mr. Chairman, if just because a government activity or  
23 a government-controlled activity was engaged in or  
24 conducted by private contractors that meant the  
25 Environmental Assessment Act didn't apply. There would

1       be a heck of a lot fewer environmental assessments.  
2       MTC don't build roads, contractors do; but MTC,  
3       notwithstanding, must receive authority under the  
4       Environmental Assessment Act to engage in the  
5       undertaking of building roads and they have done so.

6                       And the last comment I would like to make  
7       is, again, a mischaracterization of the evidence. Mr.  
8       Lindgren said if MNR's position is that they are asking  
9       for approval of the undertaking as we have defined it,  
10      the four activities, where is the environmental  
11      assessment of impacts, and with the greatest of respect  
12      to Mr. Lindgren, I would respond: Where has he been;  
13      and where was he during Panel 5 that dealt with the  
14      positive environmental effects in terms of the  
15      environment; and where was he during Panel 7 through 14  
16      which described every one of those activities, the  
17      potential adverse and positive impacts of every one of  
18      those activities and the alternative methods of  
19      implementing them; where was he when there was evidence  
20      led regarding how the Ministry goes about mitigating  
21      those potential effects?

22                      To suggest that the Ministry has led no  
23      evidence regarding environmental effects is one which  
24      surprises me and one which, in my respectful  
25      submission, should be given absolutely no weight



1       whatsoever.

2                       And those are my submissions.

3                       THE CHAIRMAN: Thank you.

4                       Very well, ladies and gentlemen, I guess  
5 we have heard enough. We shall now retire for the day  
6 and deal with this matter tonight and tomorrow, and I  
7 guess we will return here at 5:00 for the scoping  
8 exercise. Either before then or at that time we will  
9 endeavor to issue our ruling in connection with this  
10 motion.

11                      MR. LINDGREN: Mr. Chairman, just so I'm  
12 clear, did you indicate earlier that we will be  
13 commencing or re-commencing with the cross-examination  
14 on Thursday morning?

15                      THE CHAIRMAN: Yes. It appears we do  
16 have a note indicating that Mr. Hanna has no objection  
17 to postponing their motion.

18                      And I take it that the panel is available  
19 on Thursday. Mr. Cassidy, you are ready to proceed?

20                      MR. CASSIDY: On the assumption that the  
21 ruling is out, Mr. Chairman. I don't mean to put  
22 pressure on you by any stretch of imagination.

23                      THE CHAIRMAN: No, it's our intention to  
24 do our best to get it out. If for some reason we  
25 cannot comply, we will advise the parties as quickly as

1 possible.

2 MR. CASSIDY: Thank you, sir.

3 MR. FREIDIN: Mr. Chairman, as I  
4 indicated, we have to check with our witnesses to make  
5 sure that they are available for Thursday.

6 MS. BLASTORAH: Just on a quick canvass,  
7 and I am trying to do a running count here to see if  
8 I've got all my witnesses in the room.

9 Mr. Chairman, I have an indication that  
10 we can make all of the witnesses available until 3:00  
11 on Thursday.

12 THE CHAIRMAN: Okay. Well, we are going  
13 to rise at 3:00 in any event.

14 MR. FREIDIN: Starting at eight o'clock  
15 on Thursday?

16 THE CHAIRMAN: Yes.

17 MS. SEABORN: Mr. Chairman, I wonder if  
18 Ms. Devaul could telephone the other full-time parties  
19 who are normally at the hearing just so they are aware  
20 of the change in Thursday. For example, no one is here  
21 this afternoon from Mr. Hunter's office, and I don't  
22 know whether they ever made reservations to come up for  
23 the motion.

24 THE CHAIRMAN: Okay. That sounds like a  
25 good suggestion. We will instruct her to do that.

1 Thank you.

2 ---Whereupon the hearing adjourned at 5:25 p.m., to be  
3 reconvened on Wednesday, January 17th, 1990,  
4 commencing at 5:00 p.m.

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